O/a 4-1-88

IN THE SUPREME COURT
STATE OF FLORIDA

ENVIROGENICS SYSTEMS COMPANY, a Delaware corporation, Appellant, v. CITY OF CAPE CORAL, FLORIDA, a municipal corporation, Respondent.	Supreme Court Case No. 71,096
WATER SERVICES OF AMERICA, INC. Petitioner, v. CITY OF CAPE CORAL, FLORIDA, Respondent.	

PETITION FOR REVIEW OF A DECISION
OF THE SECOND DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONERS

ENVIROGENICS SYSTEMS COMPANY

AND

WATER SERVICES OF AMERICA, INC.

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PREFACE

ENVIROGENICS SYSTEMS COMPANY and WATER SERVICES OF AMERICA, INC. are the petitioners and the CITY OF CAPE CORAL is the respondent. The petitioners shall be referred to as "Envirogenics" and "Water Services", respectively, and collectively as the "utility contractors". The respondent shall be referred to as "Cape Coral". Chapter 489, Florida Statutes (1983) will be referred to as "Chapter 489", Section 489.103(1), Florida Statutes (1983) will be referred to as "Section 489.103(1)". Section 489.103(5), Florida Statutes (1983) will be referred to as "Section 489.103(5)". Chapter 468, Florida Statutes (1976) will be referred to as "Chapter 468". Section 468.114(1), Florida Statutes (1976) will be referred to as "Section 468.114(1)".

The following symbols will be used:

R. - Record

A. - Appendix

STATEMENT OF CASE

The present case involves a construction bid dispute between the City of Cape Coral (Cape Coral) and two prospective bidders, Envirogenics and Water Services, on a project involving the construction and design of a reverse osmosis water treatment facility. On or about July 19, 1984, two independent actions were instituted by the prospective bidders after they had been disqualified by Cape Coral prior to having their bids considered. (R. 4; 325-339; 411-415; 579-581; 583-584; 605-607; 665-666). On March 17, 1986, the trial judge consolidated the two cases and severed the issue presently before the court for trial. (R. 704-705; 730). After a bench trial, the lower court on July 7, 1986, entered a final declaratory judgment. (R. 728-729).

On August 1, 1986, Envirogenics filed a Notice of Appeal with the trial court (R. 731-732). Shortly thereafter, Water Services also filed a Notice of Appeal with the trial court. (R. 733-734). On November 20, 1986, Water Services moved the Second District Court of Appeal to consolidate both appeals. Water Services' motion was granted and its appeal was consolidated with that of Envirogenics. After briefing and oral argument, the Second District Court of Appeal, in an opinion filed on June 24, 1987, affirmed the decision of the lower court. Thereafter, Water Services and Envirogenics filed a Motion for Rehearing and a Motion for Rehearing En Banc. These motions were denied by the Second District Court of Appeal on August 13, 1987. On or about August 24, 1987, Envirogenics and Water Services filed a notice

to invoke the discretionary jurisdiction of this Court. On December 21, 1987 this Court rendered its Order Accepting Jurisdiction and Setting Oral Argument.

STATEMENT OF FACTS

The present case involves the award of a contract by Cape Coral for the construction and design of a reverse osmosis water treatment system and the disqualification of two bidders on that project. (R. 3; 665-666)

The reverse osmosis water treatment system consists of reverse osmosis membranes, piping, filters, pumps and other water treatment equipment housed in a pre-engineered metal building. (R. 54; 92-93; 699). The sole function of the reverse osmosis water treatment facility is to produce nine million gallons per day of drinking water and as such constitutes a utility facility. (R. 52)

The total contract price for Cape Coral's reverse osmosis system amounted to approximately Four Million Three Hundred Seventy Thousand Dollars ($4,370,000.00). (R. 54-55)

During May of 1985, Cape Coral issued invitations to bid on the reverse osmosis project. (R. 50-51) Due to the specialized nature of reverse osmosis technology, the bid documents for the project contained specialized requirements which prospective bidders were required to meet. (R. 655A-SC/3-SC/4; 107)

After engaging in extensive bid preparation, Envirogenics and Water Services submitted bids on Cape Coral's reverse osmosis project. Both Envirogenics and Water Services were pre-qualified as bidders and found to have met the specialized requirements for bidders. (R. 5; 655A; A. 4) At the time of their bid submissions, neither Envirogenics nor Water Services was licensed

as a general contractor under Chapter 489, Florida Statutes (1983). (R. 3)

Cape Coral disqualified both Envirogenics and Water Services as bidders based on the fact that neither was certified as a general contractor pursuant to Chapter 489. As a result of their disqualification, Envirogenics and Water Services instituted the present action against Cape Coral. Throughout the trial court proceedings, both parties contended that they were expressly exempted from the licensing requirements of Chapter 489 by virtue of Section 489.103(1). In support of their position, Envirogenics and Water Services relied upon the First District Court of Appeal's decision in Wood-Hopkins Contracting Co. v. Roger J. Au & Sons, Inc., 354 So. 2d 446 (Fla. 1st DCA 1978).

Envirogenics and Water Services proved at trial that the contract for the construction and design of the reverse osmosis water treatment system was a utility contract (a fact which was never seriously disputed). (R. 52) Envirogenics and Water Services also presented evidence of the fact that a very large number of contracts (at least 20) had been bid on and awarded by governmental entities and private parties to the utility contractors, who had never been licensed under Chapter 489. (R. 70-74) In fact, at the very moment the bids of Envirogenics and Water Services were rejected, Water Services was engaged in the refurbishing of the existing water treatment plant for Cape Coral, and had, without ever having been licensed as a

contractor, previously done other work on the existing water treatment plant for Cape Coral! (R. 74)

The trial court rejected Envirogenics and Water Services' argument and held that these bidders were not exempt from the licensing requirements of Chapter 489 by virtue of Section 489.103(1).

The decision of the lower court was appealed to the Second District Court of Appeal. Once again, Envirogenics and Water Services took the position that Section 489.103(1) expressly exempted contractors in work on utilities from the licensing requirements of Chapter 489. As in the trial court, Envirogenics and Water Services emphasized to the appellate court that the construction urged by them had been adopted by the First District Court of Appeal in Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc., supra. After hearing oral arguments and reviewing the briefs filed in connection with the case, the Second District Court of Appeal concluded that Section 489.103(1) did not exempt contractors in work on utilities because of a perceived inconsistency between Sections 489.103(1) and 489.103(5) of the Statute. Accordingly, the Second District Court of Appeal affirmed the decision of the lower court. The Second District Court of Appeal noted, however, that its interpretation of the exemption set forth in Section 489.103(1) was in conflict with the interpretation of this same section rendered by the First District Court of Appeal in Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc.

QUESTIONS PRESENTED

I. Whether contractors in work on utilities are exempt from the licensing requirements of Chapter 489, Florida Statutes (1983).

II. Whether the elimination of the exemption for contractors in work on utilities from the licensing requirements of Chapter 489, Florida Statutes (1983) is contrary to the stated purpose of Chapter 489, Florida Statutes (1983) and not in the best interest of the public or the State of Florida and other governmental entities.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal erred in its statutory construction of Chapter 489, Florida Statutes (1983) by deciding that the petitioning utilities contractors, Envirogenics and Water Services, were not exempt from the licensing requirements of Chapter 489, by virtue of Section 489.103(1), Florida Statutes (1983).

The simple, uncomplicated language of Section 489.103(1), expressly exempts contractors in work on utilities from the licensing requirements of Chapter 489. Section 489.103(1), states:

> "This act does not apply to:
>
> > (1) Contractors in work on bridges, roads, streets, highways, railroads, or utilities and services incidental thereto."

In order for the construction of the Second District Court of Appeal to be correct, the words "or utilities and services incidental thereto" would have to be limited to modifying or describing "bridges, roads, streets, highways, railroads". This construction is neither grammatically correct nor consistent with the punctuation used throughout Chapter 489. The punctuation and grammar utilized in Chapter 489 are uniform throughout and support the construction of Section 489.103(1) which exempts contractors in work on utilities from the licensing requirements of Chapter 489.

Throughout Chapter 489, groupings of items in one class or category are found with a conjunctive ",or" followed by the last

item in the class or category. In each instance, the last item, preceded by the ",or", is included in the class or category of items listed.

The same rule should be applied to the language in Section 489.103(1), and utilities should be included in the class or category of work exempted from the licensing provisions of Chapter 489.

Additionally, if the exempted categories under Section 489.103(1) were only "bridges, roads, streets, highways, railroads", the listing would be grammatically incorrect. Either an "and" or an "or" would have to precede the last element in the list of exempted categories. No such conjunctive "and" or "or" precedes the last word of the list of exempted categories under the proposed construction of the statute by the Second District Court of Appeal. However, a conjunctive ", or" does precede the last element in the list of exempted categories under the construction given by the First District Court of Appeal, which is the construction urged by petitioners herein.

The primary explanation given by the Second District Court of Appeal in deciding that Section 489.103(1) did not exempt contractors in work on utilities was that Section 489.103(5) appeared to be unnecessary if Section 489.103(1) were construed to exempt contractors in work on utilities, and that since the Legislature would not enact a meaningless provision, the section must be construed in such a way as to not grant an exemption.

A quick examination of the reasoning of the Second District Court of Appeal contained in its decision reveals the flaw in the appellate court's reasoning.

The Second District Court of Appeal started out to determine whether contractors in work on utilities were exempt from the licensing requirements of Chapter 489 and ended up with an analysis of whether utilities, as entities, were exempt from the licensing requirements of Chapter 489.

The inadvertent switch in the subject of the appellate court's analysis from the exemption of contractors in work on utilities to the exemption of utilities per se resulted in the appellate court erroneously concluding that the statute did not exempt contractors in work on utilities. Had the analysis by the appellate court been of the exemption of contractors in work on utilities, no error would have resulted.

Chapter 489 is internally consistent and requires a statutory construction of Section 489.103(1) which exempts contractors in work on utilities from the licensing requirements of Chapter 489.

The elimination of the exemption for contractors in work on utilities from the licensing requirements of Chapter 489 is contrary to the stated purpose of Chapter 489 and is not in the best interest of the public or the State of Florida and other governmental entities which contract for utility work.

Extremely strong reliance on the exemption from the licensing requirements of Chapter 489 has developed by

contractors in work on utilities, as well as by governmental and private entities requiring utilities work. If the exemption were eliminated, the result would be reduced availability of national level specialized utilities contractors, higher costs, and lack of access to the most recent technology in the utilities industry, all at a time when the state of Florida is undergoing unprecedented growth and requires a modern, cost-efficient utilities infrastructure.

The construction of Section 489.103(1), by the First District Court of Appeal in Wood-Hopkins Contracting Co. v. Roger Au and Son, Inc., 354 So. 2d 446 (Fla. 1st DCA 1978) granting an exemption to contractors in work on utilities from the licensing requirements of Chapter 489 is correct and desirable from every perspective. Said exemption has been relied on by all parties to utilities contracts for a period of at least ten years.

The Legislature has not amended the law nor enacted a law eliminating such an exemption, despite the passage of at least ten years. No reason exists for the Second District Court of Appeal to eliminate such exemption. In fact, the Second District Court of Appeal arrived at a different construction than the First District Court of Appeal only because of faulty logic.

The decision of the Second District Court of Appeal should be vacated, the decision of the trial court should be reversed, and the case should be remanded to the trial court for a determination of the issue of damages.

ARGUMENT

I. THE SECOND DISTRICT COURT OF APPEAL ERRED IN ITS STATUTORY CONSTRUCTION OF CHAPTER 489, FLORIDA STATUTES (1983) BY DECIDING THAT THE PETITIONING UTILITIES CONTRACTORS, ENVIROGENICS AND WATER SERVICES, WERE NOT EXEMPT FROM THE LICENSING REQUIREMENTS OF CHAPTER 489, FLORIDA STATUTES (1983) BY VIRTUE OF SECTION 489.103(1), FLORIDA STATUTES (1983).

The Second District Court of Appeal has mistakenly decided that Section 489.103(1) does not exempt contractors who work on utilities from the licensing provisions of Chapter 489. The decision of the Second District Court of Appeal was the result of a faulty analysis of the provisions of Sections 489.103(1) and 489.103(5). The Second District Court of Appeal's decision is clearly erroneous and should be reversed.

A. SECTION 489.103(1), FLORIDA STATUTES (1983) EXPRESSLY EXEMPTS CONTRACTORS WHO WORK ON UTILITIES FROM THE LICENSING REQUIREMENTS OF CHAPTER 489, FLORIDA STATUTES (1983).

Envirogenics and Water Services were expressly exempted from the licensing requirements set forth in Chapter 489. Section 489.103(1), expressly exempts contractors who work on utilities from the licensing requirements of Chapter 489. That section provides

> "489.103 Exemptions
>
> This act does not apply to:
>
> (1) Contractors in work on bridges, roads, streets, highways, railroads, or utilities and services incidental thereto."

The present case involved work on a public utility; namely, the construction and design of a reverse osmosis water treatment

facility. (R. 3) As such, Envirogenics and Water Services were specifically exempted from the licensing requirements imposed by Chapter 489. Wood-Hopkins Contracting Co. v. Roger Au & Son, Inc., supra; R. Leiby, Florida Construction Law Manual, Section 16.03 (1981).

A similar construction was afforded this statutory provision by the Attorney General in an opinion directed to the Florida Construction Industry Licensing Board. (A. 6-8) In that opinion, the Attorney General stated:

> "I am in receipt of your letter of November 26 wherein you ask whether a sewage treatment plant would be exempted from the provisions of part II of Chapter 468, Florida Statutes, on the basis of the language of Section 468.114(1) which exempts:
>
> > Contractors in work on bridges, roads, streets, highways, railroads, or utilities and services incidental thereto.
>
> Since part II of Chapter 468, Florida Statutes, does not contain a definition of the word "utility", which I believe would be the key to any exemption of a sewage treatment plant, I call your attention to Section 717.02(8), Florida Statutes, which sets forth a statutory definition of "utility" as follows:
>
> > "Utility" means any person who owns or operates within this state, for public use, any plant, equipment, property, franchise, or license for the transmission of communications; for the production, storage, transmission, sale, delivery or furnishing of electricity, water, steam, or gas; or for the transportation of persons or property."

Implicit in the above-mentioned opinion is the conclusion that Section 468.114(1), Florida Statutes (current version at

489.103(1), Florida Statutes)[1] expressly exempts contractors who work on utilities. While opinions of the Attorney General are not legally binding on the Court, they are persuasive and entitled to great weight in construing Florida Statutes. See Richey v. Town of Indian River Shores, 337 So. 2d 410 (Fla. 4th DCA 1976).

The interpretation urged by Envirogenics and Water Services and adopted by the Attorney General is further substantiated upon considering the First District Court of Appeal's decision in Wood-Hopkins Contracting Co. v. Roger Au and Son, Inc., supra. Like the present case, Wood-Hopkins Contracting Co. involved the award of a contract for the construction of improvements to a public utility. There, the awarding authority disqualified a bidder, Roger Au and Son, Inc., based on the fact that it was not licensed as a contractor under Chapter 468, Florida Statutes, (current version at Chapter 489, Florida Statutes). The trial court found that Section 468.114(1), (current version at Section 489.103(1) specifically exempted the rejected bidder from the licensing requirements contained in that chapter and directed the awarding authority to grant the contract to the rejected bidder. On appeal, the First District Court of Appeal affirmed. In reaching its decision, the appellate court stated:

> "The trial court ruled that the JEA's prequalification of Au plus the express exemption of Florida Statutes

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[1] The language and punctuation contained in Section 468.114(1), Florida Statutes (1976) and Section 489.103(1), Florida Statutes (1983) are identical. (A. 9, 10).

> Section 468.114, made registration requirements inapplicable. (emphasis supplied.)
>
> The record clearly supports the holding of the able trial court that Au is the lowest responsible bidder on the project and that the JEA could not reasonably reject Au's bid. Wood-Hopkins Contracting Co. v. Roger Au and Son, Inc., 354 So. 2d 446, 449 (Fla. 1st DCA 1978)."

Furthermore, in an important footnote to the Wood-Hopkins decision, the First District Court of Appeal stated,

> "The bid documents require registration "in accordance with Chapter 468 of the Florida Statutes. Florida Statutes Section 468.114, however, expressly exempts "contractors in work on ... utilities and services incidental thereto" from registration. Wood-Hopkins Contracting Co. v. Roger Au and Son, Inc., 354 So. 2d 446, 448 (Fla. 1st DCA 1978)"

The Wood-Hopkins decision is the only appellate case in the state of Florida construing the exemptions set forth in Section 468.114(1) (current version at Section 489.103(1). As such the law in Florida is that contractors who work on utilities are expressly exempted from the registration requirements of Chapter 489. See State v. Hayes, 333 So. 2d 51 (Fla. 4th DCA 1976).

B. THE CAPE CORAL REVERSE OSMOSIS WATER TREATMENT FACILITY CONSTITUTES A "UTILITY" WITHIN THE MEANING OF SECTION 489.103(1), FLORIDA STATUTES (1983).

Chapter 489 does not contain a definition of the term "utility". The term "utility" is, however, expressly defined in other chapters of Florida Statutes. As such, to ascertain the meaning of the word "utility" as used in Section 489.103(1), resort must be had to the other statutory definitions of this term. See Ervin v. Capital Weekly Post, 97 So. 2d 464 (Fla. 1957).

A review of Florida Statutes reveals the following definitions of the term "utility":

"717.02 Definitions . . .

> (8) "Utility" means any person who owns or operates within this state, for public use, any plant, equipment, property, franchise, or license for the transmission of communications, for the production, storage, transmission, sale, delivery or furnishing of electricity, water, steam, or gas, or for the transportation of persons or property. Section 717.02(8), Florida Statutes (1983). (emphasis supplied);

367.021 Definitions . . .

> (3) "Utility" means a water or sewer utility and, except as provided in s. 367.022, includes every person, lessee, trustee, or receiver owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide water or sewer service to the public for compensation. Section 367.021(3), Florida Statutes (1983).

812.14 Trespass and larceny with the relation to utility or cable television fixtures

> (1) As used in this section, "utility" includes any person, firm, corporation, or association, whether private, municipal, or cooperative, which is engaged in the sale, generation, provision or delivery of gas, electricity, heat, water, oil, sewer service, telephone service, telegraph service, radio service, or communication service . . . Section 812.14(1), Florida Statutes (1983). (emphasis supplied);

180.07 Public utilities; combination of plants or systems; pledge of revenues.

> (1) All reservoirs, sewage systems, trunk sewers, intercepting sewers, pump stations, wells, intakes, pipe lines, distribution systems, purification works, collecting systems, treatment and disposal works, airports, hospitals, jails and golf courses,

> and gas plants and distribution systems, whether heretofore or hereafter constructed or operated, or considered a public utility within the meaning of any constitutional or statutory provisions for the purpose of acquiring, purchasing, owning, operating, constructing, equipping and maintaining such works. Section 180.07(1), Florida Statutes (1983)."

As can be gleaned from these statutory definitions, the term "utility" includes within its meaning any system designed for the production of water. In the present case, it is unrefuted that the sole purpose of the Cape Coral reverse osmosis water treatment facility is to produce drinking water. (R. 52) Thus, the Cape Coral reverse osmosis facility falls within the plain and usual meaning of the term "utility".

C. THE PUNCTUATION AND GRAMMAR UTILIZED IN CHAPTER 489, FLORIDA STATUTES (1983) IS UNIFORM THROUGHOUT AND SUPPORTS THE CONSTRUCTION OF SECTION 489.103(1), FLORIDA STATUTES (1983) EXEMPTING CONTRACTORS IN WORK ON UTILITIES FROM THE LICENSING REQUIREMENTS OF CHAPTER 489, FLORIDA STATUTES (1983).

Throughout Chapter 489, groupings of items in one class or category are found. In each instance, the elements of the group are separated by a "," except the last element of the group, which is separated by a ", or".

For example, Section 489.103(8) groups "construction, alteration, improvement, or repair" together.

Section 489.103(9) groups operations of a "casual, minor, or inconsequential nature" together.

Section 489.103(9)(a) groups "construction, repair, remodeling, or improvement" together.

Section 489.103(11) groups "registered architect, engineer, or residential engineer" together as a group of professionals.

In each case, the last element of the group is preceded by a ", or". The ", or" is clearly being used in the conjunctive throughout Chapter 489 and precedes the last element of a group.

Looking at Section 489.103(1) in this light, it is clear that "bridges, roads, streets, highways, railroads, or utilities" are all one group and that contractors in work on any of these types of construction work are exempt from the licensing requirements of Chapter 489.

Additionally, if "utilities" is stripped away from the group consisting of "bridges, roads, streets, highways, railroads, or utilities", the group would be "bridges, roads, streets, highways, railroads", which is grammatically incorrect, because the last element of the group, "railroads" is not preceded by a connective "and" or "or". If the Legislature had intended the exempt group to be "bridges, roads, streets, highways <u>and</u> railroads", the Legislature would have written the statute that way, and allowed "utilities and services incidental thereto" to modify or describe said group.

The Legislature did <u>not</u> write the statute in a manner which supports the new construction of the statute proposed by the Second District Court of Appeal. Instead, the Legislature wrote a statute which follows a clear scheme of grammar and punctuation which should also be followed in construing Section 489.103(1).

Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resort to the rules of statutory interpretation. Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (Fla. 1918); Wagner v. Botts, 88 So. 2d 611 (Fla. 1956). The plain and obvious provisions must control. Southeastern Utilities Service Co. v. Redding, 131 So. 2d 1 (Fla. 1961). Rules of statutory construction should be used only in case of doubt and should never be used to create doubt, only to remove it. Holly v. Auld, 450 So. 2d 217 (Fla. 1984).

In the present case, the language of the statute is clear and reasonable and logical in its operation, and the Second District Court of Appeal should not speculate as to what the legislature intended. Tropical Coach Line, Inc. v. Carter, 121 So. 2d 779 (Fla. 1960); Estate of Jeffcott, 186 So. 2d 80 (Fla. 2d DCA 1966).

C. CHAPTER 489, FLORIDA STATUTES (1983) IS INTERNALLY CONSISTENT WITH AND REQUIRES A STATUTORY CONSTRUCTION OF SECTION 489.103(1), FLORIDA STATUTES (1983) WHICH EXEMPTS CONTRACTORS IN WORK ON UTILITIES FROM THE LICENSING REQUIREMENTS OF CHAPTER 489, FLORIDA STATUTES (1983).

In its decision of June 24, 1987, the Second District Court of Appeal stated:

> "If section 489.103(1) were meant to be construed as appellants urge, to exempt all utilities, it would not have been necessary to include Section 489.103(5), which exempts public utilities in regard to construction, maintenance and development work performed by their own employees. Moreover, section 489.103(5) clearly implies that while public utilities are exempt for work performed by their own employees, they are not exempt when the work is performed by individuals other than their own employees. To interpret section 489.103(5) otherwise would imply that the legislature enacted a meaningless provision."

The Second District Court of Appeals based its legal analysis on an erroneous premise and reached the wrong conclusion.

The petitioning utilities contractors herein, Envirogenics and Water Services, have never argued that Section 489.103(1) exempts all utilities. Envirogenics and Water Services simply argue that contractors in work on utilities are exempt. The distinction is crucial, because the Second District Court of Appeal reached its erroneous conclusion by considering whether it would be necessary to exempt public utilities specifically in Section 489.103(5) if all utilities were supposedly exempted already under Section 489.103(1).

What has been argued throughout by Envirogenics and Water Services is that Section 489.103(1) exempts "contractors in work on utilities" and that they are exempt form the licensing requirements of Chapter 489 because they are "contractors in work on utilities".

The term "contractor" is defined at Section 489.105(3) as follows:

> "Contractor" means the person who is qualified for and responsible for the entire project contracted for and means, except as exempted in this act, the person who, for compensation, undertakes to, submits a bid to, or does himself or by others construct, repair, alter, remodel, add to, subtract from, or improve any building or structure, including related improvements to real estate, for others or for resale to others." (emphasis supplied.)

Envirogenics and Water Services, as companies which submit bids, construct, repair, alter, remodel, add to, subtract from,

or improve any building or structure for others or resale to others are clearly "contractors" as said term is defined in Section 489.105(3), and are exempted from the licensing requirements of Chapter 489 by Section 489.103(1) which exempts "contractors in work on utilities".

However, the case of "public utilities on construction, maintenance, and development work performed by their employees, which work is incidental to their business", described in Section 489.103(5), is different.

For example, if a public utility, through its employees, builds a cafeteria or snack bar for its employees, the work performed by the employees is incidental to the business of the public utility because the facilities are eating facilities required by its employees, and the employees and public utility would be exempt.

If the public utility through its employees built the cafeteria or snack bar for some other person, the public utility and its employees would not be exempt from the licensing provisions of Chapter 489.

Public utilities and their employees do not neatly fit into the definition of a contractor, because work being performed by the public utility through its employees is arguably not work for sale to others but is work to carry on the business of the public utility. On the other hand, the employees are doing work for their employer, which is work for another, and arguably requires a license. The Legislature deemed it necessary to create a

specific exemption for public utilities and their employees in order to avoid any misunderstanding.

The work performed by the employees of a public utility is not necessarily utilities work but is work incidental to the business of the utility. But for the exemption provided by Section 489.103(5), the employees of a public utility might be required to be licensed as contractors for work other than utilities work performed for the public utilities. The result would be chaos for the public utility, because its roofers would be required to be licensed as roofers, its masons as masons, and so on. The administrative and economic cost would be enormous. To avoid this and other confusion regarding the employees' possible status as contractors required to have a license, the Legislature simply provided public utilities with an exemption for work performed by their employees which is incidental to their business.

It should be noted that the term "utilities" in Section 489.103(1) refers to a type of facility, whereas the term "public utility" in Section 489.103(5) refers to a type of business entity. The two terms are not interchangeable, and an analysis of the Sections 489.103(1) and 489.103(5) should be accomplished with this fact in mind.

The specific exemption of public utilities on work performed by their employees which is incidental to their business is necessary, as demonstrated above.

The exemption of public utilities as business entities does not overlap with the exemption provided to contractors in work on utilities and is not redundant.

Each of the exemptions provided in Sections 489.103(1) and 485.103(5) is necessary and consistent with the other.

The analysis of the Second District Court of Appeal was clearly erroneous, and resulted in a clearly erroneous construction of Section 489.103(1) which is contrary to the construction of the same statute by the First District Court of Appeal and the Attorney General of the State of Florida.

II. THE ELIMINATION OF THE EXEMPTION FOR CONTRACTORS IN WORK ON UTILITIES FROM THE LICENSING REQUIREMENTS OF CHAPTER 489, FLORIDA STATUTES (1983) IS CONTRARY TO THE STATED PURPOSE OF CHAPTER 489, FLORIDA STATUTES (1983) AND IS NOT IN THE BEST INTEREST OF THE PUBLIC OR THE STATE OF FLORIDA AND OTHER GOVERNMENTAL ENTITIES.

The purpose of Chapter 489, Florida Statutes is found at Section 489.101, which states:

"489.101 Purpose

> The Legislature recognizes that the construction and home improvement industries are significant industries. Such industries may pose significant harm to the public when incompetent or dishonest contractors provide unsafe, unstable, or short-lived products or services. Therefore, it is necessary in the interest of the public health, safety, and welfare to regulate the construction industry." (emphasis supplied)

The wording of Section 489.101 strongly conveys the impression that the purpose of Chapter 489 is to protect the individual homeowner from unscrupulous contractors. Certainly, governmental entities are capable of contracting for construction

work. An exemption from the licensing requirements of Chapter 489 was given to contractors in work on bridges, roads, streets, highways, railroads and utilities because these types of construction are usually performed for governmental entities and no need exists for the protection of the individual member of the public. In the present case, the contracting agency is a municipality, the City of Cape Coral.

Extremely strong reliance on the exemption from the licensing requirements of Chapter 489 has developed by contractors in work on utilities as well as by governmental and private entities requiring utilities work. Water Services has bid on twenty or more water plants in the state of Florida (R. 70), and has built at least ten in the state of Florida (R. 72) including three plants in Key West, Florida, a plant in Indian River County, and three contracts performed for the City of Cape Coral itself. (R. 72) At no time was Water Services licensed as a contractor in the State of Florida. (R. 3) Of the facilities constructed by Water Services, numerous were constructed for governmental entities. (R. 73, 74, 75)

Reverse osmosis water desalination technology is extremely new and limited to a very few manufacturing companies. (R. 21) None of these companies is based in Florida. It is in the best interest of the people of the State of Florida to have specialty companies such as Envirogenics and Water Services be able to freely bid and perform construction of water desalination plants.

As the population of Florida grows, development will accelerate rapidly, and along with it, the need for a modern, efficient, cost-effective utilities infrastructure.

It is not in the best interest of the public for contractors such as Envirogenics and Water Services, who possess highly specialized technology which is desperately needed in Florida, to be barred from providing their technology in Florida. This reality was recognized by the Legislature, and an exemption from the licensing provisions of Chapter 489 was granted.

This wisdom of the Legislature should not be substituted or eliminated.

CONCLUSION

The law in the State of Florida is that contractors who work on utilities are expressly exempted from the registration requirements of Chapter 489. It is undisputed that the project in questions falls within the plain and ordinary meaning of the term "utility" in that its sole function is to produce drinking water. As such, in submitting its bid on the Cape Coral reverse osmosis facility, Envirogenics and Water Services were expressly exempted under Section 489.103(1) from the licensing requirements of Chapter 489. From a grammatical and punctuation standpoint, Section 489.103(1) can only be read to exempt contractors in work on utilities. From a logical standpoint, Section 489.103(1) can only be read to exempt contractors in work on utilities.

The Second District Court of Appeal reached its clearly erroneous decision by inadvertently switching in mid-stream from an analysis of the exemption for contractors in work on utilities to an analysis of public utilities as entitites. The decision of the Second District Court of Appeal, if left to stand, would directly overrule the decision of the First District Court of Appeal in Wood-Hopkins. Contractors, governmental entities and private parties have relied on this exemption for over ten years. The Legislature has not repealed nor amended the law. No reason exists for the elimination, by an erroneous and unnecessary construction of such a clear, logical exemption.

The purpose of Chapter 489 is fulfilled by the exemption, as are the best interests of the public and government.

The decision of the Second District Court of Appeal should be reversed, and the case remanded to the trial court for consideration of the issue of damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13th day of January, 1988 to William M. Powell, City Attorney, Post Office Box 150027, Cape Coral, FL 33915-0027.

GEORGE P. KNOTT