

71,096

IN THE SUPREME COURT  
STATE OF FLORIDA

ENVIROGENICS SYSTEMS COMPANY,  
a Delaware corporation,

Appellant, Petitioner,

v.

CITY OF CAPE CORAL, FLORIDA,  
a municipal corporation,

Appellee, Respondent,

WATER SERVICES OF AMERICA, INC.

Appellant, Petitioner,

v.

CITY OF CAPE CORAL, FLORIDA,

Appellee, Respondent.

AUG 22 1987

CLERK, SUPREME COURT  
By *pl* Supreme Court  
Deputy Clerk  
Case No. \_\_\_\_\_

) District Court  
) Case No. 86-2031

) Supreme Court  
) Case No. \_\_\_\_\_

) District Court  
) Case No. 86-2045

BRIEF ON JURISDICTION OF APPELLANTS/PETITIONERS

ENVIROGENICS SYSTEMS COMPANY

AND

WATER SERVICES OF AMERICA, INC.

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PREFACE

The appellants are the petitioners and the appellee is the respondent. The appellants, petitioners shall be referred to as "Envirogenics" and "Water Services," respectively, and the appellee, respondent shall be referred to as "Cape Coral."

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 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.

## 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).

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, Florida Statutes (1983). 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, Florida Statutes (1983) by virtue of Section 489.103(1), Florida Statutes (1983). 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 & Son, Inc., 354 So.2d 446 (Fla. 1st DCA 1978). 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 for work on utilities from the licensing requirements of Chapter 489. As in the trial court, appellants

emphasized to the appellate court that, the construction urged by the appellants had been adopted by the First District Court of Appeal in Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc. 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 but only contractors in work on utilities which were incidental to "...bridges, roads, streets, highways [and] railroads." 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. A & Son, Inc.

It is based on this conflict that Envirogenics and Water Services seek to have the Court invoke its jurisdiction.

QUESTION PRESENTED

Whether the decision of the Second District Court of Appeal is in express and direct conflict with the decision of the First District Court of Appeal in Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc. with respect to the meaning of the exemption set forth in Section 489.103(1), Florida Statutes (1983)?

## SUMMARY OF ARGUMENT

The decision of the Second District Court of Appeal in the present case with respect to the meaning of the exemption set forth in Section 489.103(1) expressly and directly conflicts with the interpretation of that same section rendered by the First District Court of Appeal in Wood-Hopkins Contracting Co. v. Roger J. Au and Son, Inc., 354 So.2d 446 (Fla. 1st DCA 1978). While the First District Court of Appeal has interpreted this exemption as exempting all contractors in work on utilities, the Second District Court of Appeal has construed this same exemption as only exempting contractors in work on utilities incidental to bridges, roads, streets, highways or railroads. In light of this express and direct conflict between two District Courts of Appeal, jurisdiction is conferred upon this Court. Until the Court exercises its jurisdiction, the meaning of the exemption set forth in Section 489.103(1), Florida Statutes, will remain unclear.

ARGUMENT

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN THE PRESENT CASE WITH RESPECT TO THE MEANING OF THE EXEMPTION SET FORTH IN SECTION 489.103(1) IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN WOOD-HOPKINS CONTRACTING CO. V. ROGER J. AU & SON, INC.

The decision of the Second District Court of Appeal with respect to the meaning of the exemption set forth in Section 489.103(1) expressly and directly conflicts with the interpretation of that same section rendered by the First District Court of Appeal in Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc..

Section 489.103 sets forth a number of exemptions to the provisions of Chapter 489. Of particular interest in the instant case, is the exemption set forth in Section 489.103(1). 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.

In the present case, the Second District Court of Appeal has construed this exemption to mean that only contractors in work on utilities incidental to bridges, roads, streets, highways or railroads are exempted from the provision of Chapter 489. The First District Court of Appeal in Wood-Hopkins v. Roger J. Au & Son, Inc. interpreted this same provision as exempting all contractors in work on utilities.

This construction by the First District Court of Appeal becomes apparent upon reviewing its decision. Like in the present case, Wood-Hopkins Contracting Co. v. Roger Au & Son,

Inc. involved the award of a contract, for the construction of improvements to a public utility. There, the awarding authority disqualified a bidder, Roger Au & 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). Upon being disqualified, Roger Au & Son, Inc., instituted suit seeking a writ of mandamus. In determining the qualification issue, the trial court found that Section 468.114(1), Florida Statutes, (current version at Section 489.103(1), Florida Statutes)<sup>1</sup> specifically exempted Roger Au & Son, Inc., from the licensing requirements contained in that chapter and directed the awarding authority to grant the contract to the disqualified 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 Statute Section 468.114, made registration requirements inapplicable.

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 reasonable 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 a 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

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<sup>1</sup>The language and punctuation contained in Section 468.114(1), Florida Statutes, and Section 489.103(1), Florida Statutes, are identical. (A.xi-xii).

"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)

As can be gleaned from the Wood-Hopkins decision, the First District Court of Appeal interprets the exemption set forth in 489.103(1) as exempting all contractors in work on utilities.

In interpreting this same section, the Second District Court of Appeal has expressly rejected the interpretation rendered by the First District Court of Appeal. The Second District Court of Appeal has determined that the exemption contained in Section 489.103(1) does not exempt all contractors who work on utilities; rather the Second District Court of Appeal has interpreted that exemption to only apply to contractors who work on utilities incidental to "... bridges, roads, streets, highways, railroads ...."

The conflict existing between the Second and First District Courts of Appeal with respect to the exemption contained in Section 489.103(1) was alluded to in the opinion rendered by the Second District Court of Appeal in the present case. The Second District Court of Appeal concluded its opinion by stating:

In reaching this conclusion, we also realize that we are, or may be, in conflict with Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc., 354 So.2d 446 (Fla. 1st DCA 1978). While it appears from Wood-Hopkins that the court there was not squarely presented with this question, the opinion does espouse the interpretation urged by appellants here.

An examination of both opinions clearly establishes that an express and direct conflict exists between the First and Second Districts Courts of Appeal with respect to the meaning of the

exemption contained in Section 489.103(1). In light of this express and direct conflict, jurisdiction is conferred upon this Court. Nelson v. Sarasota, 117 So.2d 731 (Fla. 1960) and see City of Jacksonville v. Florida First National Bank of Jacksonville, 339 So.2d 632,633 (Fla. 1976) (England, J., concurring).

The Court should exercise the jurisdiction conferred upon it to clarify the meaning of the exemptions set forth in Section 489.103(1). Until this Court so exercises its jurisdiction, the meaning of Section 489.103(1) will remain unclear. Considering the numerous infrastructure improvements associated with Florida's rapid growth and the fact that contractors who perform specialty work such as utility work are quite few in number, and are many times not located in the State of Florida or licensed as contractors in the State of Florida, it is in the best interest of the public to clarify this issue. Without clarification by this Court, this issue will undoubtedly result in future problems and litigation.

CONCLUSION

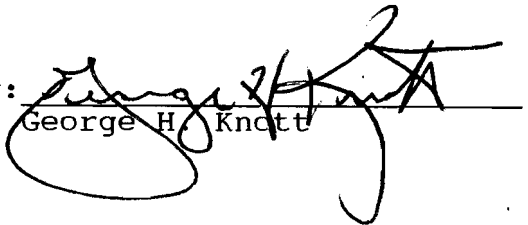
The express and direct conflict which exists between the First and Second District Courts of Appeal with respect to the meaning of the exemption contained in Section 489.103(1) confers jurisdiction upon this Court. Considering the numerous infrastructure improvements associated with Florida's rapid growth and the fact that many specialty contractors, such as utility contractors, are many times not located in the State of Florida or licensed as contractors in the State of Florida, it is in the public's best interest that this Court exercise the jurisdiction conferred upon it to clarify the meaning of this exemption. Until this is accomplished, future problems will undoubtedly recur.

Respectfully submitted,

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By:   
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By:   
George H. Knott

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing BRIEF ON JURISDICTION OF APPELLANTS/PETITIONERS ENVIROGENICS SYSTEMS COMPANY AND WATER SERVICES OF AMERICA, INC., has been furnished by regular United States mail to William M. Powell, Esq., Attorney for Appellee, P. O. Box 150027, Cape Coral, Florida 33915, on this 28th day of August, 1987.

  
Enrique Arroyo