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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
Willie D. Franks, Chairman

Case No. 2026-000914

In Re: Haren Construction Co., Inc.

Project No. P24-6052-PG
Beaufort-Waddel Mariculture
Maturation Ponds Maintenance – Re-Bid

Paragon Inc. of South Carolina, LLC, Chief Procurement Officer, State Fiscal Accountability Authority, and South Carolina Department of Natural Resources,

of which Paragon Inc. of South Carolina, LLC and Chief Procurement Officer, State Fiscal Accountability Authority are the Appellants/Respondents, South Carolina Department of Natural Resources is the Respondent/Appellant, and Haren Construction Co., Inc. is the Respondent.

THE CHIEF PROCUREMENT OFFICER’S RETURN TO DNR’S MOTION TO DISMISS

Appellant/Respondent Chief Procurement Officer (CPO) of the State Fiscal Accountability Authority submits this Return to the Motion to Dismiss filed by Respondent/Appellant South Carolina Department of Natural Resources (DNR). Notably, DNR’s Motion is based on issues it has raised, not as the respondent, but as a cross appellant. This is an unusual posture, and it presents the Court with issues more suitable for resolution through briefing and oral argument than through motion practice.

[Note: referenced exhibits are to DNR’s exhibits attached to its Motion to Dismiss]

BACKGROUND

This dispute arose out of DNR's disqualification of the apparent low bidder to a project for the renovation and rehabilitation of the Waddle Mariculture Center in Beaufort. After receiving bids, Appellant/Respondent Paragon Inc. of South Carolina, LLC (Paragon) was the low bidder. DNR then disqualified Paragon on the basis that it (1) lacked the proper contractor license subclassification and (2) failed to bid in its exact name. (DNR Ex. 1, PRP000066-67). DNR concluded that 80% of the project required a "General Contractors-Public Utility" license with a "Water and Sewer Lines" (WL license) subclassification, and that Paragon, which holds a "Mechanical Contractors" license with "Plumbing" subclassification (PB license), was unqualified.¹ DNR then issued an intent to award to the second lowest bidder, Respondent Haren Construction Co., Inc. (Haren).

Paragon protested DNR's determination to the CPO, who is the Chief Procurement Officer for Construction and the State Engineer, who oversees permanent improvement projects in South Carolina. S.C. Code Ann. § 11-35-845. The CPO granted the protest. He concluded that the scope of the project fit within the plain language of the PB license, and that a contractor holding either a PB or WL license was qualified. *Id.* at PRP000015-21. The CPO also found that Paragon's failure to bid in its exact name was a minor infraction not affecting Paragon's ability to perform the work. *Id.*

Haren then appealed to the Procurement Review Panel (Panel). While the Panel found that Paragon's failure to use its exact name did not affect its responsibility and was not a basis for disqualification, the Panel otherwise deferred to DNR and reversed the CPO. According to the Panel:

¹ See S.C. Code Ann. §§ 40-11-410(3)(c) (WL license) and -410(5)(f) (PB license).

Deference is warranted where the dispute concerns the technical application of licensing categories to specialized mariculture infrastructure. Under *Kiawah*, the Panel recognizes that DNR possesses the expertise necessary to evaluate the technical nature of the Project's intake and distribution systems. The mere possibility that the PB subclassification could have been selected does not render DNR's actual determination clearly erroneous under § 11-35-2410(A). The relevant inquiry is not whether the Panel would have selected the same classification, but whether DNR's determination lacked a rational basis.

(DNR Ex. 2, pp. 12-13).

Both the CPO and Paragon filed motions to reconsider. They argued that, not only had the Panel failed to interpret the scope of the PB license under § 40-11-410(5)(f)—an issue of law subject to de novo review—but it had also improperly applied a *Chevron* deference to an agency not charged with administering the contractor-licensing laws. They further argued that the Panel had failed to consider whether DNR's interpretation of § 40-11-410(5)(f) was contrary to law. DNR also filed a motion to reconsider, arguing that the Panel should have also upheld DNR's disqualification of Paragon for failing to bid in its exact name. The Panel denied the motions.

On April 9, Paragon filed this appeal. On April 13, the CPO filed a Notice of Appeal to join Paragon as an appellant. On April 21, DNR filed a cross appeal.

ARGUMENT

1. None of the issues raised by DNR justify dismissing the appeal.

DNR's Motion to Dismiss raises four arguments, each of which is discussed below.

A. DNR's argument that Paragon is "statutorily barred from participating in SCDNR's Procurement Action which deprived the CPO, Panel, and this Court of Jurisdiction."

DNR's Motion makes the remarkable claim that nobody—not even this Court—has jurisdiction to question DNR's determination when it disqualified Paragon on the basis that it failed to bid in its exact name. (DNR Mot., pp. 3-8). The CPO, however, has jurisdiction to hear and determine bid protests under § 11-35-4210(1)(B). The Panel has jurisdiction under § 11-35-

4410(a)(1) to handle appeals from the CPO. And this Court, of course, has the jurisdiction established by the Constitution to handle cases and controversies and, in particular, bid protest appeals under § 11-35-4410(6).

As to the merits of DNR's argument, DNR alleges that Paragon's failure to bid in the exact name rendered its bid void *ab initio*. However, this is not how the statute reads. Under § 40-11-370(B) a contractor may not "engage in construction" unless using the exact name which appears on the license. Under subparagraph (C), a contractor that has entered a contract under the wrong name may not bring an action to enforce the contract. The provisions, however, have no bearing on a contractor's *responsibility* to perform the work. When this issue was first protested to the CPO, the CPO found as follows:

[U]nlike other provisions in the licensing law, a violation of this Section is not a bar to the contractor performing the work on which they bid. In years past, the Contractors Licensing Board staff have advised the CPOC that this is a minor infraction not affecting a contractor's ability to perform the work. Moreover, Paragon Inc. of South Carolina, LLC, does appear on Paragon's license application as its legal name and Paragon Builders as its trade name. Additionally, Paragon provided its license number with its bid clearly identifying it as Paragon Builders. At the most, Paragon's bidding in its legal name rather than its trade name as it appears on its license is a minor informality per Section 11-35-1520(13).

(DNR's Ex. 1, PRP000020-21).

Paragon's licensing application was made in the licensee/legal name of Paragon, Inc. of South Carolina, LLC with a d/b/a name of Paragon Builders. *Id.* at PRP000040. That is its exact legal name and the same name it placed on its bid. The fact that LLR placed a different name on the physical license is outside Paragon's control and is simply a function of LLR's administrative practices. Further, Paragon's bid used its exact contractor's license number, so DNR was not confused about who was bidding on the project. But ultimately this issue does not impact Paragon's responsibility, and even the Panel—which addressed the issue despite DNR failing to

file a timely appeal—disagreed with DNR on this issue. (DNR Ex. 2, p. 11). The intent of the statute is to prevent a shady contractor from hiding its identity or its licensing status or fraudulently misappropriating another’s name. With Paragon using its legal name, with its licensing number, nobody was confused or surprised by the minor variance from the license certificate. The CPO and the Panel found the issue completely immaterial, and Haren did not even bother appealing the issue to the Panel.²

Finally, DNR’s Motion confuses the difference between an *unlicensed* contractor and a contractor that simply fails to use its exact name. DNR cites § 40-11-200(B) as an example of an unlawful practice, but that section references contractors who lack a proper license, not licensed contractors that fail to use their exact name. DNR also cites the Panel case of *Protest of Roofco*, Panel Case No. 2000-14(II), but the Panel simply found a contractor lacking the proper license is not responsible. In this case, it is undisputed that Paragon is a licensed contractor. The only dispute is whether Paragon’s PB license rendered it qualified to perform the specific type of work required for the project. There is simply no basis to dismiss the appeal at this stage.

B. Argument that Paragon lacks standing to protest DNR’s determination of non-responsibility.

Like the jurisdictional argument above, this argument is likewise remarkable. Under § 11-35-4210(1)(b), an actual bidder “aggrieved in connection with the intended award or award of a contract” may file a bid protest with the CPO. Paragon bid on the project and was aggrieved when,

² Further, this issue is not ripe. While § 40-11-370(A) makes it unlawful for an *unlicensed contractor* to bid on work, the same prohibition does not apply for contractors failing to use the correct name. Contractors using the incorrect name are prohibited from “engaging in construction” under the wrong name, and that includes “submitting contracts.” S.C. Code Ann. § 40-11-370(B) However, Paragon has neither submitted nor entered a contract in this case. It merely submitted a bid.

despite having the low bid, it was disqualified. It has met the statutory requirements for standing to challenge whether DNR's application of the law was correct.

C. DNR's argument that Paragon failed to exhaust administrative remedies.

DNR's argument that Paragon failed to exhaust administrative remedies rests on DNR's application of a hyper-strict pleading requirement that is neither found in the law, nor supported by Panel precedent. DNR alleges that Paragon failed to adequately protest the determination of non-responsibility because Paragon's protest used the word "responsiveness" instead of "responsibility."³

Like a pleading filed in court, a bid protest is not judged by highly technical or formal standards. Protests must set "forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided." S.C. Code § 11-35-4210(2). This is consistent with the law our courts apply to pleadings, which are construed liberally.

The law requires a plaintiff to state the facts constituting his cause of action and demand the relief to which he supposes himself entitled, he is not required to characterize the facts stated, or to give his cause of action a name; that being the province of the court.

Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965). The Panel applies the same liberal pleading standard to protests. *Protest of Oakland Janitorial Serv., Inc.*, Panel Case No. 1988-13.⁴

³ A "responsive" bidder is one that submits a bid conforming in all material aspects to the solicitation. S.C. Code Ann. § 11-35-1410(9). A "responsible" bidder is one who has the capability to perform. *Id.* at § 11-35-1410(9). In the context of contractor licensing, there is a history of confusion as to whether an unlicensed contractor is considered non-responsive or non-responsible. See Footnote 5, below.

⁴ Obviously, Panel decisions are not binding on the courts, and the CPO only cites them for historical context for how the Panel has handled certain protest appeals. They can be found in the "SCPD" database on Westlaw. A cite of "SCPD 1988-13" will display the *Oakland Janitorial* case.

Paragon's protest was more than sufficient under § 11-35-4210(2). The protest expressly challenged the DNR's determination and rebutted its conclusions that Paragon lacked a proper license and used the wrong name. (DNR Ex. 1, PRP000024-32). The protest stated its factual and legal basis and specified the relief it sought. It clearly alleged that it had been wrongfully disqualified. While it used the word "responsiveness" instead of "responsibility," these two concepts have historically been used interchangeably with regards to contractor licensing.⁵ Nobody was confused, and all were put on notice of the issues to be decided.

D. DNR's argument that it is "statutorily prohibited" from awarding a contract to Paragon.

DNR argues that the appeal is moot because it cannot award a contract to Paragon unless it uses its exact name. For the reasons discussed above, this argument lacks merit. In any event, this issue is premature. No contract has been awarded. If DNR is concerned about Paragon's name, it can simply put its listed name on the contract.

2. DNR's Motion to Dismiss should be denied because it is based on issues that it failed to raise in a timely appeal to the Procurement Review Panel.

Under the Procurement Code, an aggrieved bidder may file a protest with the CPO, who must then conduct an administrative review and resolve the protest. S.C. Code Ann. § 11-35-4210(4). The CPO's decision is final and conclusive unless a "person adversely affected" appeals to the Panel within ten days. *Id.* at § 11-35-4210(6). Although DNR, as a state agency, lacks standing to file a bid protest, it has standing to appeal a CPO decision. Thus, "an affected

⁵ For example, in *Appeal by Palmetto Pavement Maint.*, Panel Case No. 1996-7, the CPO found a bidder non-responsive for lacking the proper contracting license, and the Panel affirmed on that basis. In *Protest of Roofco*, Panel Case No. 2001-14(II), the CPO determined the contractor nonresponsive for lacking a proper license, but the Panel corrected the CPO's terminology and stated, "[t]echnically this is an issue of nonresponsibility." Nevertheless, the Panel knew what the CPO meant. In *Appeal by Midwest Maint.*, Panel Case No. 2004-3, the project manager determined a contractor non-responsive for lacking a specialty roofing license. But the project manager later testified that he "agreed the issue was one of responsibility instead of responsiveness." In short, if the Panel, CPO, and procurement staff have confused responsiveness and responsibility in the context of contractor licensing, it is hard to fault a protest that does the same.

governmental body shall have the opportunity to participate fully as a party in a matter pending before the Procurement Review Panel[.]” *Id.* at § 11-35-4420.

Although Haren appealed the CPO’s decision to the Panel, DNR did not. Haren’s appeal did not dispute the CPO’s resolution of the name-discrepancy issue; it simply argued that (1) DNR had properly disqualified Paragon for lacking a PB license and (2) the disqualification was also proper because of an alleged citation issued by LLR against Paragon. *Id.* With no party appealing the name-discrepancy, it became final and conclusive under § 11-35-4210(6).

Having failed to appeal the CPO’s decision, DNR attempted to raise the issues in a brief filed with the Panel, some 48 days after the CPO’s decision dated November 19, 2025. (DNR Ex. 1, PRP000015-21; Ex. 4). But this was too late. By failing to file an appeal within the ten-day deadline set by § 11-35-4210(6), DNR’s cross-appeal claims should be jurisdictionally barred. For the deadlines in § 11-35-4210(6) to have meaning, they should be enforced.⁶

⁶ While in limited circumstances Panel will decide issues outside the appeal letter, *Appeal of Skanska*, Panel Case No. 2003-8, the Panel has generally limited these circumstances to contract controversies, where claims sometimes require hearing multiple issues before the Panel can afford full relief, or where a respondent raises additional sustaining grounds to a CPO decision. *Appeal by EllisDon*, Panel Case No. 2005-2(II) (contract controversy); *Appeal by PSI*, Panel Case No. 2022-5 (additional sustaining grounds). Neither of these circumstances is present here. Indeed, in *Protest of Kodak*, Panel Case No. 1988-15, the Panel declined to address an issue that an agency failed to appeal, noting that “if the time limitations on appeal are to have any meaning, DMH must be bound by its decision to accept the CPO’s findings.”

CONCLUSION

For the reasons stated above, this Court should deny DNR's Motion to Dismiss.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Manton M. Grier, Jr.", is positioned above a horizontal line.

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PROOF OF SERVICE

The undersigned certifies that I have served all counsel in this action with the Chief Procurement Officer's Return to DNR's Motion to Dismiss by emailing a copy to each attorney listed below.

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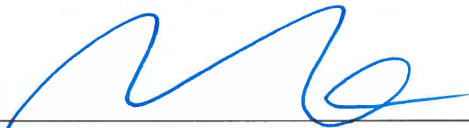
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