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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

Appellate Case No. 2026-000914
Case No. 2025-5

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.

SCDNR REPLY TO THE RETURN OF CPO TO SCDNR'S MOTION TO DISMISS

The South Carolina Department of Natural Resources (SCDNR or Department) submits this Reply to the Chief Procurement Officer's (CPO) Return to SCDNR's Motion to Dismiss.[1] Rule 240(f), SCACR. On the basis of the Department's arguments in the original motion and provided herein, the Department respectfully asks that the Court grant the Motion to Dismiss.

[1] The Department filed and served its Motion to Dismiss electronically pursuant to Rules 240 and 262, SCACR, and Supreme Court Order re: Methods of Electronic Filing and Service under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024) on April 25, 2026. The CPO timely filed a return on May 5, 2026.

ARGUMENTS

I. Jurisdictional Defects in Paragon's Appeal

The CPO challenges the basis for the Department's motion on the distinct grounds presented in the Department's motion which will each be addressed in turn below. However, as a preliminary matter, the Department considers it important to establish some context for the status of the CPO and Panel as administrative bodies.

First, the CPO and Procurement Review Panel are part of the executive branch of government which operate in the realm of administrative law. *See* S.C. Code Ann. § 11-55-10, *et seq*. (1976 & Supp. 2025)(establishing the powers, duties, responsibilities and authorities of SFAA and its relationship to the former Budget and Control Board); §11-35-510 (describing authority of the chief procurement officer); §11-35-4210(4)(describing role of chief procurement officer in conducting an "administrative review"); §11-35-4210(6)(describing review before Panel as "further administrative review by the Procurement Review Panel"); §11-35-4410(4)("administrative reviews conducted by either a chief procurement officer or the Procurement Review Panel."); *Hampton v. Haley*, 403 S.C. 395, 404, 743 S.E.2d 258, 262 (2013)(" Of course, the executive branch, including the [Budget and Control] Board, may exercise discretion in executing the laws, but only that discretion given by the legislature."); *Tall Tower, Inc. v. S.C. Procurement Review Panel,* 294 S.C. 225, 363 S.E.2d 683 (1987)(discussing executive branch functions of the Procurement Review Panel).

Second, the CPO and Procurement Review Panel, as executive branch administrative bodies, are "creatures of statute." In application this Court has stated "administrative agencies are creatures of statute, their power is dependent on statute and that any reasonable doubt as to the existence of a particular power should ordinarily be resolved against the

exercise of the power." *Hamm v. Central States Health and Life Co. of Omaha*, 298 S.C. 446, 447, 381 S.E.2d 355, 356 (Ct. App. 1989); *see also Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991)(an agency, "[a]s a creature of statute, ... is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged.").

Finally, the CPO and Procurement Review Panel are charged by law to "faithfully execute" statutory enactments of the General Assembly. *State ex rel. Condon v. Hodges*, 349 S.C. 232, 246, 562 S.E.2d 623, 631 (2002)("the Governor and other members of the executive branch were required to faithfully execute" legislative enactments). "Executive agencies are required to comply with the General Assembly's enactment of a law until it has been otherwise declared invalid." *Edwards v. State*, 383 S.C. 82, 91, 678 S.E.2d 412, 417 (2009).

To the extent the CPO and Panel were performing quasi-judicial functions in performing administrative review, they are obligated to uphold the "rule of law." As the South Carolina Supreme Court has explained: "As judges, our solemn duty is to uphold the rule of law; we must maintain judicial discipline, refrain from acting as a super-legislature, and respect the plenary authority of the South Carolina General Assembly." *Planned Parenthood South Atlantic v. State,* 440 S.C. 465, 484, 892 S.E.2d 121, 132 (2023). Subsequently that Court also stated, "The particular 'rule of law' we commit to in this case is the principle of statutory construction that a court's singular task in interpreting a statute is to identify and give effect to the intent of the legislature." *Planned Parenthood South Atlantic v. State,* 445 S.C. 600, 606, 916 S.E.2d 299, 302 (2025). "We prefer to view it as rescuing the rule of law by fulfilling our responsibility to ensure that our government officials and courts act within their authority." *State v. Price*, 441 S.C. 423, 449, 895 S.E.2d 633, 647 (2023).

These background principles are relevant to further discussions below and support the Department's basis for dismissing this appeal.

A. Statutory Barrier for Paragon's Bid

In its motion, the Department asserts that applicable licensing requirements are a mandatory prerequisite for Paragon Inc. of South Carolina, LLC's ("Paragon") bid which exists before even entering the realm of the Department's procurement action. Having failed that, the Department asserts Paragon cannot lawfully submit a bid. The CPO overlooks those licensing statutes and skips forward to review / appeal provisions within the Procurement Code to claim Paragon is not barred from participating in the procurement action and this appeal. Additionally, the CPO disregards the statutory term of "exact name which appears on the license" and suggest the Department, like the CPO, should disregard the legislative requirement. The Department's position and rebuttal are simple, Paragon can't reach the "procurement house" when it can't first get through the surrounding "licensing fence."

The statutory provisions that Paragon failed to obey require a contractor to use the exact name that appears on its license when submitting bids. Those provisions include the following:

> **SECTION 40-11-30. Licensing requirement.**
>
> *No entity or individual may practice as a contractor by performing or offering to perform contracting work* for which the total cost of construction is greater than ten thousand dollars for general contracting or greater than ten thousand dollars for mechanical contracting *without a license issued in accordance with this chapter*.

S.C. Code Ann. § 40-11-30(1976 & Supp. 2025)(emphasis added).

> **SECTION 40-11-200. Unlawful practice; penalty.**
>
> ***
>
> (B) It is a violation of this chapter for an awarding authority, owner, contractor, or an agent of an authority, owner, or contractor *to consider a bid*, sign a contract, or allow a contractor to begin work *unless the bidder or contractor has first obtained the licenses required by this chapter*. Bids or contracts submitted by contractors

> may not be reconsidered or resubmitted to an awarding authority, contractor, or owner if the contractor was not properly licensed at the time the initial bid or contract was submitted.

S.C. Code Ann. § 40-11-200(B)(1976 & Supp. 2025)(emphasis added). "Bid" is defined as "an offer to furnish labor, equipment, or materials or other services regulated by this chapter." S.C. Code Ann. § 40-11-20(3)(1976 & Supp. 2025).

> **SECTION 40-11-370. License required to use term "licensed contractor"; engaging in construction under assumed name; enforcement of contract.**
>
> (A) It is unlawful to use the term "licensed contractor" or to perform or *offer to perform general or mechanical construction without first obtaining a license as required by this chapter*.
>
> (B) *It is unlawful to engage in construction under a name other than the exact name which appears on the license issued pursuant to this chapter.* "*Engaging in construction" includes* marketing, advertising, using site signs, *and submitting contracts*. This requirement does not include advertising on vehicles, which may use an abbreviated version of the license name so long as the advertising is not misleading.
>
> (C) An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract. *An entity that enters into a contract to engage in construction in a name other than the name that appears on its license may not bring an action either at law or in equity to enforce the provisions of the contract.*

S.C. Code Ann. § 40-11-370(1976 & Supp. 2025)(emphasis added).

In its decision below and its Return, the CPO attempts to replace "exact name which appears on the license" with alternatives such as the name appearing on Paragon's license application or a license number. The plain language of the statute is perfectly clear and does not invite or allow for the alternatives proposed by the CPO. The South Carolina Supreme Court provides clear instructions on statutory construction:

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's

> place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (*citing Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature."

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Under such guidance, "exact name" cannot be a "license number" and "appears on the license" cannot be "appears on the application."

To the extent the CPO relies on the misunderstanding or prior misapplication by LLR and CPO staff, such mistakes are not a legitimate basis for ignoring the statutory requirements. First, "[e]veryone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests." *Smothers v. U.S. Fid. & Guar. Co.,* 322 S.C. 207, 210–211, 470 S.E.2d 858, 860 (1996); *see also LaBruce v. City of North Charleston*, 268 S.C. 465, 234 S.E.2d 866 (1977)("Citizens are charged with knowledge of existing law."). Next, "administrative officers of the state cannot estop the state through mistaken statements of law." *Quail Hill, L.L.C. v. County of Richland*, 387 S.C. 223, 237, 692 S.E.2d 499, 506 (2010). Therefore, the CPO's position does not support displace the statutory requirements.

Furthermore, the CPO's decision below and arguments in the Return admit and confirm that Paragon violated S.C. Code Ann. § 40-11-370 yet the CPO asks that the failure be excused. The factual admissions and concessions of the CPO are "violation of [Section 40-11-370(B)]" and "Paragon's bidding in its legal name rather than its trade name as it appears on its license" (November 19, 2025 CPO Decision, pp. 6-7 / SCDNR Motion to Dismiss pp. 8-9). Likewise, the Panel conceded the same legal defects: "name variation" (March 13, 2026 Panel Order p. 11 /

SCDNR Motion to Dismiss p. 77) and "name variation on Paragon's bid" (April 6, 2026 Panel Order Denying Motions for Reconsideration, p. 3 / SCDNR Motion to Dismiss p. 85). The law is clear and the CPO and Panel have conceded both the factual and legal violation of Section 40-11-370. This is an adequate basis for granting the Department's Motion to Dismiss.

Finally, the CPO claims that Paragon's violation of statutory licensing requirements "have no bearing on a contractor's responsibility to perform the work." (CPO Return to SCDNR Motion to Dismiss, p. 4). In reply, the Department need only point to the regulations establishing Standards of Responsibility: "Factors to be considered in determining whether the state standards of responsibility have been met include whether a prospective contractor has: … (2) a satisfactory record of integrity; (3) *qualified legally to contract with the State*." S.C. Regs. 19-445.2125(A)(emphasis added); *see also* S.C. Code Ann. §§ 11-35-1810; 40-11-200 and 40-11-370. It is and has been the Department's position that being "qualified legally to contract with the State" includes complying with the statutory licensing requirements of Sections 40-11-30, -200, and -370. (SCDNR Brief to Panel p. 12 / SCDNR Motion to Dismiss p. 98). Contrary to the CPO's position, the Procurement Code and the associated regulations very clearly make a licensing qualification relevant to a bidder's responsibility.

B. Statutory Bar to Standing

The Department asserts that section 40-11-370 expressly prohibits Paragon from initiating or maintaining this appeal. The CPO looks to section 11-35-4210(1)(b) to provide Paragon with standing. Consistent with the discussion in the Department's motion and above, Paragon cannot reach relief under section 11-35-4210 when it failed to overcome the threshold barrier of section 40-11-370. The Department's position honors both statutory provisions by framing them

sequentially – section 40-11-370 is the first hurdle before an applicant can reach the Procurement Code - but the CPO's position simply disregards section 40-11-370. *Chris J. Yahnis Coastal, Inc. v. Stroh Brewery Co*., 295 S.C. 243, 247, 368 S.E.2d 64, 66 (1988)("Statutes in apparent conflict should, if reasonably possible, be construed so as to allow both to stand and to give effect to each.").

C. Failure to Exhaust Administrative Remedies

The Department asserts Paragon did not adequately protest the Department's non-responsibility determination and failed to exhaust administrative remedies thus depriving the CPO, Panel, and this Court of jurisdiction. In challenging the Department's assertion, the CPO claims the Department is making a "hyper-strict pleading requirement that is neither found in the law, nor supported by Panel precedent" and that tangling responsibility and responsiveness doesn't matter. (CPO Return to Motion to Dismiss, pp. 6-7). As explained in the Department's motion and reframed above, the CPO and Panel are creatures of statute and, by law, the failure to exhaust an administrative remedy is a statutory prerequisite that is jurisdictional.

First, the absence of a prior Panel decision on this point or prior Panel decisions misapplying the exhaustion requirement are simply not relevant or binding upon this Court. *See Sanders v. Litchfield Country Club,* 297 S.C. 339, 377 S.E.2d 111 (Ct.App.1989)(where jurisdictional issue is raised, this Court must review record and make its own determination whether the preponderance of evidence supports Commission's factual findings bearing on that issue). "Determining the proper interpretation of a statute is a question of law, which this Court reviews de novo." *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., L.L.C.*, 409 S.C. 331, 339, 762 S.E.2d 561, 565 (2014). Likewise, this Court may interpret statutes "without any

deference to the court below." *Brock v. Town of Mt. Pleasant*, 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016).

Under the Procurement Code, the terms and concepts of "responsible" and "responsive" are defined and distinct with respect to their standards, application and consequences. "Responsible bidder or offeror" is defined as "a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance." S.C. Code Ann. § 11-35-1410(8). In contrast, "Responsive bidder or offeror" is "a person who has submitted a bid or proposal which conforms in all material aspects to the invitation for bids or request for proposals." S.C. Code Ann. § 11-35-1410(9).

Absent the statutory definition of the terms "responsible" and "responsive" and the resulting differential treatment under the Procurement Code, the CPO's argument might have some traction affording some latitude. However, legal proceedings do require specificity in many contexts and the instant situation is one given the substantial material difference between claims about responsibility and responsiveness. *See Carson v. South Carolina Dep't of Natural Res.*, 371 S.C. 114, 120, 638 S.E.2d 45, 48 (2002) (court sitting in appellate capacity may not consider issues not raised or ruled on by administrative agency); *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)(holding that imposing preservation requirements on an appellant "prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case"); *Gainey v. Gainey*, 279 S.C. 68, 70, 301 S.E.2d 763, 764 (1983) ("Normally, a party may not receive relief which was not requested in the pleadings."); *Parker Peanut Co. v. Felder*, 207 S.C. 63, 68, 34 S.E.2d 488, 490 (1945) ("[I]ncidental or auxiliary

relief granted must be within the limits of the issues made by the pleadings ...."); *Gatewood v. S.C. Dep't of Corr.*, 416 S.C. 304, 324, 785 S.E.2d 600, 611 (Ct. App. 2016) ("An issue that is not raised to an administrative agency is not preserved for appellate review by the ALC."); *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 368, 656 S.E.2d 765, 768-69 (Ct. App. 2007) (citations omitted)("This [c]ourt requires parties to plead for prejudgment interest in order for it to be recovered. If no request for pre-judgment interest is made in the pleadings, it cannot be recovered on appeal."); *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004)("The trial court's decision to strike a defense as insufficiently pled will not be disturbed absent an abuse of discretion."); *Prevatte v. Asbury Arms*, 302 S.C. 413, 415, 396 S.E.2d 642, 643 (Ct. App. 1990) (requiring parties to "plead either a contract or a statute to receive ... attorney's fees").

D. Statutory Bar to Award Contract

Paragon's failure to obtain a license in the exact name of Paragon Inc. of South Carolina, LLC precludes the Department from being able to award the construction job to Paragon and renders the appeal moot. Despite the clear statutory mandates discussed in the original motion and above, the CPO argues the issue is premature and that "[n]o contract has been awarded. If DNR is concerned about Paragon's name, it can simply put its listed name on the contract." (CPO Return to Motion to Dismiss, p. 7).

The root of the Department's argument that Paragon's appeal is moot is that Paragon, has not and cannot satisfy Section 40-11-200. That statute requires in part: "Bids or contracts submitted by contractors *may not be reconsidered or resubmitted to an awarding authority*, contractor, or owner *if the contractor was not properly licensed at the time the initial bid or contract was*

submitted. S.C. Code Ann. § 4011-200(B)(emphasis added). In failing to submit a compliant bid to the Department, Paragon cannot remedy it after the fact. Similarly, the leading portion of Section 40-11-200 prohibits the Department's consideration of a noncompliant bid and there is no basis for the Department to rehabilitate a flawed bid given the final sentence of the section. *See also* S.C. Code Ann. § 40-11-30 & -370.

Finally, to the extent the CPO states "no contract has been awarded" it is not clear whether that is being suggested as to Paragon or Haren.[2] With respect to Paragon, there certainly has not been a contract awarded although Paragon did submit a bid / offer that was rejected by the Department. (SCDNR Motion to Dismiss pp. 53 & 55). On that point, the lack of a contract held by Paragon and the statutory barriers to obtaining one support the Department's challenge to Paragon's standing as otherwise presented in the Motion to Dismiss.

II. Timeliness of Jurisdictional Challenge

While acknowledging the Department is a statutory[3] party to a procurement appeal before the Procurement Review Panel and thereafter, the CPO claims that the Department is time barred from raising a jurisdictional challenge. (CPO Return to Motion to Dismiss, p. 7-8). The Department counters that the CPO is overlooking the well know principle that a challenge to jurisdiction may be raised at any time and courts or other reviewing bodies are obligated to address jurisdiction as a threshold issue, even *sua sponte*. "The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised sua sponte by the

[2] The Department is in receipt of the Court's May 7, 2026 imposing a temporary stay and directing the parties to address the status of the contract award to Haren. Accordingly, the Department will address the status of the Haren award seperately in response to that Order.

[3] "The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully as a party in a matter pending before the Procurement Review Panel and in an appeal of a decision of the Procurement Review Panel, whether administrative or judicial." S.C. Code Ann. § 11-35-4420(1976 & Supp. 2025).

court." *Town of Hilton Head Island v. Godwin*, 370 S.C. 221, 223, 634 S.E.2d 59, 60-61 (Ct. App. 2006). *See also City of Columbia v. South Carolina Pub. Serv. Commn.,* 242 S.C. 528, 533, 131 S.E.2d 705, 707 (1963); *Riddle v. Reese*, 53 S.C. 198, 31 S.E. 222 (1898); *Bell v. Fludd*, 28 S.C. 313, __, 5 S.E. 810, 811(1888)(when facing a jurisdictional challenge it "would be not only premature, but improper, for [the court] to consider or determine" the merits); *Hardie v. United States*, 367 F.3d 1288, 1290 (Fed. Cir. 2004) (explaining jurisdiction is a threshold issue that a court must resolve before proceeding to the merits). This broader concept is directly applicable in the context of administrative law, including the actions related to the Consolidated Procurement Code. *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 585, 743 S.E.2d 786, 791 (2013)("The General Assembly has the authority to limit the subject matter jurisdiction of a court it has created; therefore, it can prescribe the parameters of the ALC's powers."); *Allison v. W.L. Gore & Assocs*., 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011)("A court's subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question. [] This same principle applies to administrative agencies.")(internal citation omitted); *Hitachi Data Systems Corp. v. Leatherman*, 309 S.C. 174, 178-179, 420 S.E.2d 843, 846 (1992)(discussing statutory limitations upon the Procurement Review Panel's authority); *Forman v. S.C. Dep't of Labor*, 419 S.C. 64, 74, 796 S.E.2d 138, 143 (Ct. App. 2016).

Additionally, to the extent the CPO asks that the Department's jurisdictional challenges before the Panel be jurisdictionally barred, this argument is "downstream" to the preceding jurisdictional defects in Paragon's appeal and as discussed above, the jurisdictional challenge raised by the Department can be raised at any time. *Town of Hilton Head Island*, 370 S.C. at 223, 634 S.E.2d at 60-61.

CONCLUSION

Based on the authorities and arguments set forth in the Department's motion and above, the Department respectfully requests that the Court grant the Motion to Dismiss and vacate the March 13, 2026 and April 6, 2026 Orders of the South Carolina Procurement Review Panel and the underlying November 19, 2025 Decision of the Chief Procurement Officer.

Respectfully submitted,
s/ Van Whitehead

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May 7, 2026

(SCDNR 25-0060)
(Ct. App. 2026-000914)

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PROOF OF SERVICE

I certify that I have served the **SCDNR REPLY TO THE RETURN OF CPO TO SCDNR'S MOTION TO DISMISS** upon counsel for all parties and the South Carolina Procurement Review Panel in the above captioned matter by sending a copy by email to each attorney listed below on May 7, 2026.

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