

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
MOTION TO SUPPLEMENT THE RECORD¹**

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 Supplement the Record. Rule 240(f), SCACR.

Under the unique posture of this pending appeal, the Department has asked for confirmation that it may deem, if so designated by a party, the Court-ordered memorandum and associated exhibits to be part of the Record on Appeal. The Department made this request in the

¹ The Department does not intend this Reply to be construed as a waiver or abandonment of the Department’s jurisdictional challenges reserved for argument before the Court.

interest of judicial economy and simplified logistics under the expedited briefing schedule established by the Court. The CPO has largely consented to the Department's request but has lodged a vociferous objection to inclusion of the Affidavit of Jeff Boyer as a potential record item.²

First, the CPO asserts "DNR should have explained to the Court why this affidavit, executed after the appeal was filed and not considered in the proceedings below, should be included in the Record on Appeal." Although the Department perceived the "why" to be obvious, it will try to elaborate more fully now.

The Court's May 7, 2026 Order directed the parties to brief the contract award issue and provide "documentation and support evidencing the contract award," which included matters occurring after the administrative review below. To the extent the Court's Order related to the Department's prior Motion to Dismiss, the Department determined it was necessary to file a supporting affidavit. Rule 240(c)(3), SCACR, provides: "Where the Record on Appeal or Appendix has not been filed, or where the facts relied upon in support of the motion are not contained in the Record on Appeal or Appendix, *the parties shall file affidavits and other documents in support of their positions.*" (emphasis added). Therefore, the May 14, 2026 Affidavit of Jeff Boyer was created³ and filed in response to the May 7, 2026 Order and, in addition to satisfying Rule 240(c)(3), served two standard purposes. It provided necessary factual evidence as to the status of the contract award as was discussed in the Department's memorandum and similarly operated as a means of authenticating the other exhibits to the Department's memorandum. *S.C.*

² The Department must note that neither the CPO nor Paragon Inc. of South Carolina, LLC filed a memorandum in response to the Court's May 7, 2026 Order and presented no objections to the Court's consideration of the Department's memorandum or its exhibits, including the affidavit. Therefore, it would appear that the CPO's objections are largely untimely when the Court has already received and considered the affidavit in reaching a decision in the May 20, 2026 Order. Despite the CPO's new objections, the affidavit is already part of this appeal.

³ The affidavit itself states: "I have prepared and executed this affidavit to address the requirements of the May 7, 2026 Order of the South Carolina Court of Appeal[s] in the above-referenced matter." Affidavit of Jeff Boyer at p. 1, para. 1 (Exhibit 1 to CPO's Return to SCDNR's Motion to Supplement the Record).

Dep't of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) (“Arguments made by counsel are not evidence.”) and *State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018); 2 McCormick On Evid. § 221 (7th ed. 2016) (“[I]n all jurisdictions the requirement of authentication applies to all tangible and demonstrative exhibits.”). Whether the Court was reviewing the award issue on the basis of jurisdiction or mootness, it was appropriate for the Court to seek factual information and have it presented in a reliable manner. *Gray v. Club Group, Ltd.*, 339 S.C. 173, 181, 528 S.E.2d 435, 439 (Ct.App.2000)(a reviewing court is not bound by the administrative body’s findings of fact upon which jurisdiction is dependent). Building upon this foundation, the Court’s May 20, 2026 Order provides: “Indeed, the parties shall further brief the “award” arguments raised in the memorandums submitted in response to the May 7, 2026 order and the resultant remedies available under the South Carolina Procurement Code.” Therefore, by direction of the Court, the Department submitted the affidavit as “support evidencing the contract award” and intends to rely upon it in complying with the order to further brief the award issue.

Next, the CPO claims the affidavit “goes too far” in describing the identity and experiences of Mr. Boyer. The Department disagrees and asserts the affidavit includes appropriate background information about the affiant, Mr. Jeff Boyer. *See Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 303, 433 S.E.2d 871, 873 (Ct.App.1993) (discussing that an affidavit must assert the basis for any such belief or knowledge). As expressed in Rule 56(e), SCRCP, “[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and *shall show affirmatively that the affiant is competent to testify as to the matters stated therein.*” (emphasis added). *Accord*, 1 S.C. Jur. Affidavits § 14 (March 2026 Update)(“Generally, an affidavit may be made by anyone who has knowledge of the facts and who is competent to testify.”) and 1 S.C. Jur. Affidavits § 35 Applicability of Rules of Evidence (March

2026 Update)(“Generally, affidavits offered in evidence are governed by the applicable rules of evidence. They would be subject to objections on the grounds of competency, materiality, relevancy, hearsay and other grounds.”). Thus, the inclusion of information on Mr. Boyer’s background was justified to establish his competence.

The CPO also complains that the affidavit contains facts not presented during the administrative review below and that “[n]one of this information was requested by this Court or relevant to the status of DNR’s contract with Haren.” As addressed above and in the Department’s Memorandum to the Court, the Court did request evidence on the contract award which necessarily includes matters occurring after the administrative review and has instructed the parties to address the same in their briefs. Therefore, the information in the affidavit was requested and remains relevant to the Court’s evaluation in this appeal.

Based on the arguments set forth in the Department’s motion and above, the Department respectfully requests an order allowing the parties to designate the memoranda exhibits, including the Affidavit of Jeff Boyer, as part of the record as outlined in the Department’s motion.

[Signature Page Follows]

Respectfully submitted,

s/ Van Whitehead

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May 29, 2026

(SCDNR 25-0060)

(Ct. App. 2026-000914)

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May 29 2026

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PROOF OF SERVICE

I certify that I have served the SCDNR's **Reply to the Return of CPO to SCDNR Motion to Supplement the Record** 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 29, 2026.

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