

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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-Waddell 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.

INITIAL RESPONDENT’S BRIEF OF SCDNR, RESPONDENT-APPELLANT

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STATEMENT OF ISSUES ON APPEAL¹

- I. Whether the Panel's deference to SCDNR's determinations under the Procurement Code and associated LLR licensing provisions were appropriate.
- II. Whether the Panel conducted an appropriate review under section 11-35-2410(A) before reversing the CPO's license classification decision.
- III. Whether the Panel correctly affirmed that Paragon was non-responsible based on license subclassification and percentage.
- IV. Whether Paragon's desired procurement remedies are available under applicable law.

¹ While exercising its right to file this brief in response to the appeal of Appellants-Respondents, the Department reserves all challenges presented in the Department's cross-appeal and does not intend any phrasing in this brief to be construed as a waiver or abandonment of the Department's cross-appeal arguments. However, for the sake of presentation, the Department has refrained from inserting throughout that responses are made assuming *arguendo* that jurisdiction exists or otherwise made in the alternative. Furthermore, to the extent the Court dismisses this appeal on the jurisdictional grounds raised by the Department and voids the administrative decisions of the CPO and Panel, the various concerns of the Appellants-Respondents as to license types and deference would be ameliorated and otherwise moot.

STATEMENT OF THE CASE

On October 20, 2025, the South Carolina Department of Natural Resources (“SCDNR” or “Department”) posted a notice of intent to award the Waddell Mariculture Center renovation solicitation to Haren Construction Co., Inc. (“Haren”). On October 27, 2025, Paragon Inc. of South Carolina, LLC (“Paragon”) filed a notice of intent to protest with the Chief Procurement Officer (“CPO”) and, on October 30, 2025, filed a formal protest with the CPO. The CPO rendered a decision on November 19, 2025 overturning the Department’s decision. Haren challenged the CPO decision on November 26, 2025 and the Procurement Review Panel (“Panel”) rendered a decision on March 13, 2026 reversing the CPO and reinstating the Department award to Haren. The CPO, Paragon, and SCDNR filed motions for reconsideration which the Panel denied on April 6, 2026, leaving the March 13, 2026 disposition unchanged. On April 9, 2026, Paragon moved for a stay which was opposed by the Department and Haren before the Panel denied it on April 14, 2026.

Paragon filed a notice of appeal on April 9, 2026 and the CPO joined in that on April 13, 2026. The Department filed a notice of cross-appeal on April 21, 2026. The parties subsequently filed several motions which prompted the Court to issue an order on May 7, 2026 instructing the parties to provide a memorandum addressing the status of the solicitation award. The Department and Haren filed the requested memoranda and, on May 20, 2026, the Court addressed all motions then pending, preserved for briefing arguments made in the prior motions, and instructed the parties to brief the “award” arguments in the memoranda. On May 27, 2026 the Department filed a motion to supplement which the Court granted on June 12, 2026.²

² On May 29, 2026, Haren filed a Petition for review of the Court’s stay pending this appeal to which the Department filed a response in support and Paragon filed a response in opposition. The CPO filed no response and Haren filed a reply. Haren’s petition was pending at the time this initial brief was prepared.

STANDARD OF REVIEW

The basic standard of review in the appeal from an administrative body is established in the South Carolina Administrative Procedures Act. S.C. Code Ann. § 1-23-380 (1976, Supp. 2025, and as amended by 2026 Act No. 251).³ Although the Consolidated Procurement Code creates a unique standard for the CPO and Panel in the proceedings below⁴, the Procurement Code specifies that section 1-23-380 controls for appeals beyond the Panel. S.C. Code Ann. § 11-35-4410(6) (1976 & Supp. 2025). Therefore, the newly enacted standard of review is as follows:

(5)(a) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

³ As of June 30, 2026, the Small Business Regulatory Freedom Act amended section 1-23-380(5) by renumbering the section and adding section (b). 2026 Act No. 251.

⁴ As will be discussed more fully below, the Consolidated Procurement Code adopts the “clearly erroneous, arbitrary, capricious, or contrary to law” standard of review for the CPO and Panel to apply during administrative review pursuant to S.C. Code Ann. § 11-35-2410(A)(1976 & Supp. 2025)(applying that standard to review of responsibility determinations under S.C. Code Ann. § 11-35-1810); *see also* S.C. Code Ann. § 11-35-4410(4)(1976 & Supp. 2025)(“the Administrative Procedures Act does not apply to administrative reviews conducted by either a chief procurement officer or the Procurement Review Panel.”). Additionally, the Panel is “charged with the responsibility to review and determine de novo: (a) requests for review of written determinations of the chief procurement officers pursuant to Sections 11-35-4210(6).” S.C. Code Ann. § 11-35-4410(1).

(b) In interpreting a statute or regulation, the court shall not defer to the agency's interpretation of the statute or regulation and instead shall interpret the statute or regulation de novo.

S.C. Code Ann. § 1-23-380(5)(as amended June 30, 2026).

FACTS

In South Carolina, a contractor intending to undertake construction work being solicited by a state agency must satisfy tiered legal requirements. First, contractors must be licensed appropriately by the South Carolina Department of Labor Licensing and Regulation (LLR). *See generally*, S.C. Code Ann. § 40-11-5, *et seq.* (1976 & Supp. 2025). Next, a contractor must comply with the South Carolina Consolidated Procurement Code under which the solicitation for construction services is made by a state agency. *See generally*, S.C. Code Ann. § 11-35-10, *et seq.* (1976 & Supp. 2025). This appeal concerns application of law from both tiers.

I. License Classification

In making the necessary evaluations for a procurement action, the Procurement Code mandates consideration of certain licensing requirements applicable to bidders. *See* S.C. Code Ann. §11-35-1810(2); *see also* S.C. Code Ann. § 40-11-340 (establishing percentage requirements for license classifications); S.C. Regs. 19-445.2125(D); S.C. Regs. 19-445.2145(F). In turn, those licensing determinations are fact dependent and involve professional judgment. (R.p.____, Order pp. 3-9).

In complex construction projects, such as the Waddell Mariculture Center restoration underlying this appeal, the Department employs external consulting engineers to develop the voluminous specifications to support the solicitation and construction process. With guidance from

the Department, Schnabel Engineering served that role and prepared the bid / construction specifications. (R.p. _____, PRP 62, 84, 74-477). As part of the specifications, Schnabel developed itemized cost estimates that, in part, define the scope and nature of the project. (R.p. _____, PRP 74). Among the itemized elements, the specifications include the following:

6000 linear feet (LF) of 10” high density polyethylene pipe (HDPE)

256 linear feet of 8” high density polyethylene pipe

512 linear feet of 6” high density polyethylene pipe

Twelve 10” butterfly valves

2,000 square feet (SF) of water tower interior recoating

2,000 square feet (SF) of water tower exterior recoating

100 linear feet of 24” overflow piping

50 linear feet of 10” [groundwater] (GW) piping

50 linear feet of 8” [groundwater] (GW) piping

75 linear feet of 12” [saltwater] (SW) piping

Five 10” valves

Four 12” valves

(R.p. _____, PRP 74). Based on the total cost estimate, 80% of the work would require a “WL” or water and sewer line license subclassification. (R.p. _____, PRP 74). Furthermore, given the value of the solicitation, which exceeded the Department’s “construction certification”⁵, the Office of State Engineer had to approved it. (R.p. _____, PRP 67, 68, 84, SCDNR Memo

⁵ See generally, S.C. Code Ann. §§ 11-35-510, -840, -845, -1010, -1210 (1976 & Supp. 2025) and State Fiscal Accountability Authority - Division of Procurement Services “Agency Certification” (<https://procurement.sc.gov/doing-biz/certification> - last visited July 17, 2026).

to Court, Affidavit of Jeff Boyer, Request for Concurrence in Posting Notice of Intent to Award Design-Bid-Build Contract).

Haren holds a LLR contractor's license that includes a "General Contractors-Public Utility" classification with a "Water and Sewer Lines" (WL) subclassification, as described in S.C. Code Ann. § 40-11-410(3)(c) (1976 & Supp. 2025). (R.p._____, Order p. 3). The record contains no LLR license in the name of Paragon Inc. of South Carolina, LLC. However, LLR issued "Paragon Builders" a license that has a "Mechanical Contractors" classification with a "Plumbing" subclassification, as described in S.C. Code Ann. § 40-11-410(5)(f)(1976 & Supp. 2025). (R.p._____, PRP 36, 38). Furthermore, a contractor with a "Mechanical Contractor" classification may only serve as the sole prime contractor if 51% of the total project costs fall under the classification or subclassification. S.C. Code Ann. § 40-11-340 (1976 & Supp. 2025).

II. Panel Orders

With respect to the allegations of Paragon and the CPO, it is helpful to review key elements of the Panel's decisions below.

March 13, 2026 Order

Although the parties raise several issues concerning licensing classifications, statutory exclusions, protest sufficiency, and scope of review, the dispositive question is whether DNR's non-responsibility determination was clearly erroneous, arbitrary, capricious, or contrary to law under S.C. Code Ann. § 11-35-2410(A).

Upon de novo review of the administrative record, the parties' briefs, and the applicable law, the Panel concludes that DNR's determination was not clearly erroneous, arbitrary, capricious, or contrary to law. The CPO's decision is therefore reversed.

(R.p. _____, Order p.1)

DNR relied on the engineer of record's opinion of cost and allocation of project costs by license classification contained in the administrative record. The estimate separated licensed construction work from non-licensed project costs, including

contractor overhead and profit, insurance and bonds, engineering during construction, and third-party inspections. PRP000074. Based on that review, DNR issued a written determination dated October 17, 2025, concluding that Paragon was non-responsible – and therefore ineligible for award – because it did not satisfy the contractor licensing requirements of Title 40 of the South Carolina Code. PRP000066.

(R.p. _____, Order p.3)

DNR’s written determination relied upon the engineer’s opinion of cost and allocation of project costs by license classification in concluding that eighty percent of the Project required WL licensure. PRP000066. The administrative record also includes the engineer’s allocation supporting that conclusion. PRP000074.

Although Paragon asserted a different percentage allocation in its protest, the administrative record contains no competing engineering estimate or line-item cost analysis demonstrating that DNR’s allocation was factually unsupported or artificially structured. PRP000026; PRP000074.

(R.p. _____, Order p.4)

Courts reviewing administrative decisions do not substitute their discretion for that of the agency in matters committed to agency expertise. The South Carolina Supreme Court has cautioned that otherwise “[j]udicial discretion in a non-judicial field would be substituted for that of the appropriate administrative agency. This we cannot do.” *Guerard v. Whitner*, 276 S.C. 521, 523, 280 S.E.2d 539, 540 (1981).

(R.p. _____, Order p.5)

In accordance with this principle of deference, judicial review of factual determinations made in the administrative process is limited. “As to factual issues, judicial review of administrative agency orders is limited to a determination of whether the order is supported by substantial evidence.” *Murphy v. S.C. Dep’t of Health & Env’tl. Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 194 (2012)

(R.p. _____, Order p.5)

Under the substantial evidence standard, the reviewing body does not reweigh technical evidence or resolve competing expert judgments but determines only whether the agency’s decision has a rational evidentiary basis in the record. Courts reviewing administrative decisions “need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion.”

Schwiers v. S.C. Dep't of Health & Envtl. Control, 429 S.C. 43, 49, 837 S.E.2d 730, 733 (Ct. App. 2019).

Panel precedent likewise recognizes that responsibility determinations are made by the procuring agency. The Panel has explained that “[t]he responsibility inquiry is delegated to the procuring agency and the Panel takes the position that review of this issue is limited to whether the procuring officer’s determination was clearly erroneous, arbitrary, capricious, or contrary to law.” *In re Value Options*, Case No. 2001-7, at 7 (S.C. Procurement Rev. Panel Aug. 3, 2001).

(R.p. _____, Order p.6-7)

This deference reflects the institutional role of administrative agencies. Courts defer to agencies “because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations.” *Kiawah Dev. Partners II*, 411 S.C. at 34. At the same time, agency deference does not permit an interpretation that conflicts with the statute itself. The Supreme Court has explained that courts will reject an agency’s interpretation “where the plain language of a statute is contrary to the agency’s interpretation.” *Davis*, 444 S.C. at 150.

(R.p. _____, Order p.7)

Because the ability to lawfully perform the work required by the solicitation is part of a bidder’s legal capacity to perform the contract, questions concerning applicable contractor licensing requirements may properly arise during a procuring agency’s responsibility determination.

When a responsibility determination requires application of a statute administered by another state agency, the procuring agency must apply that statute in evaluating bidder responsibility.

(R.p. _____, Order p.8)

Accordingly, determining whether the work required by a solicitation falls within a particular contractor license classification is part of the procuring agency’s responsibility determination. Such determinations are “final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law.” S.C. Code Ann. § 11-35-2410(A).

(R.p. _____, Order p.9)

Although appeals to the Panel are conducted de novo, responsibility determinations remain subject to the standard of review set forth in § 11-35-2410(A). The Panel therefore does not decide which contractor license classification it would independently select, but whether DNR's determination lacked a rational basis or was contrary to law.

(R.p. _____, Order p.11)

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.

(R.p. _____, Order p.12)

Because DNR's determination that eighty percent of the Project required WL licensure aligns with the components described in § 40-11-410(3)(c) and reflects the agency's technical expertise, it had a rational basis and was not clearly erroneous, arbitrary, capricious, or contrary to law.

(R.p. _____, Order p.13)

Responsibility determinations fall within the discretion of the procuring agency, and state agencies possess broad authority to make such procurement judgments. *Value Options*, at 6.

(R.p. _____, Order p.13)

Under the substantial evidence standard governing administrative review, a reviewing body does not reweigh technical evidence or substitute its judgment for competing expert evaluations. See *Murphy*, 396 S.C. at 639; *Lark*, 276 S.C. at 135; *Rhame*, 415 S.C. at 167. The inquiry is whether the agency's determination is supported by evidence from which reasonable minds could reach the same conclusion. Because DNR relied on a professional engineering estimate contained in the administrative record, its determination that Paragon did not satisfy the statutory requirements for sole prime eligibility is supported by substantial evidence.

(R.p. _____, Order p.14)

April 6, 2026 Order Denying Motions to Reconsider

The Panel first conducted a de novo review of the CPO's decision and independently determined that the relevant statutory provisions, as applied to the Project, do not mandate a single license subclassification as a matter of law. The Panel then determined that, under S.C. Code Ann. § 11-35-2410(A), DNR's selection among legally permissible subclassifications was not clearly erroneous, arbitrary, capricious, or contrary to law, and that the record demonstrated a rational basis for that determination. See Order dated March 13, 2026, at 11-14. To the extent the Order referenced DNR's technical expertise, that discussion pertained to DNR's selection of license subclassifications for the Project, not the Panel's interpretation of those statutes. Having concluded that DNR's determination was not contrary to law, the Panel could not and did not substitute its judgment for that of DNR. The Panel's review of DNR's determination was limited to the statutory standard. Because the governing statutes do not compel a single license subclassification, the Panel was not required to select one.

Consistent with that conclusion, the Panel recognized that the license subclassifications do not, on their face, resolve the Project's unique technical nature. In this context, those subclassifications permit more than one reasonable interpretation. The Panel's determination is supported by the absence of any competing engineering estimate or line-item cost analysis showing that DNR's cost allocation by license subclassification was factually unsupported or artificially structured (Order at 4). This analysis reflects the Panel's independent application of the governing statutes to the record rather than any deference to DNR's interpretation of law.

(R.p. _____, Order Denying Motions to Reconsider p.2)

For the sake of presentation beyond these introductory facts, further facts are presented within the following arguments.

ARGUMENTS

I. The Panel's deference to SCDNR's determinations under the Procurement Code and associated LLR licensing provisions were appropriate.

The Appellants-Respondents' leading argument is that the Panel erred by improperly deferring to the Department's determination of non-responsibility based in part on section 40-11-410(5)(f). Within this general argument, they claim: a) the Department is not charged with

administering the statute, b) licensing qualification is purely a matter of law and not fact, and c) that the Panel erred in not interpreting the statute. Such arguments fall short for several reasons.

First, it is important to consider the legal context of the Panel’s decision. The Panel is reviewing a determination of non-responsibility under the Procurement Code. S.C. Code Ann. §11-35-1810(2); (R.p.____; Order p.1). Consistent with statutory and other authorities, the Panel acknowledged the Department is charged to make a determination of responsibility by the Procurement Code. (R.p.____; Order pp. 8-9); S.C. Code Ann. §11-35-1810(2)(“Determination of Nonresponsibility. A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with regulations promulgated by the board.”); S.C. Regs. 19-445.2125(D)(“the procurement officer must be satisfied that the prospective contractor is responsible”); *see also* S.C. Regs. 19-445.2145(F) and Office of State Engineer OSE Manual “MANUAL FOR PLANNING AND EXECUTION OF STATE PERMANENT IMPROVEMENTS” (2023)(<https://procurement.sc.gov/manual> - last visited July 17, 2026) – Section 6.11 Determination of Bidder’s Responsibility(“the Agency must satisfy itself that the apparent low Bidder meets the State’s Standards of Responsibility”). Going further with respect to licensing, the OSE Manual provides:

6.11 DETERMINATION OF BIDDER’S RESPONSIBILITY

Before posting the SE-370, the Agency must satisfy itself that the apparent low Bidder meets the State’s Standards of Responsibility.

6.11.1 Criteria for Determining Responsibility

Criteria the Agency should use in determining whether the Bidder meets the State’s Standards of Responsibility include whether the Bidder has:

- A. The appropriate financial, material, equipment, facility, and personnel resources and expertise (or the ability to obtain them) necessary to meet all contractual requirements.
- B. A satisfactory record of performance.

C. A satisfactory record of integrity.

D. *The necessary legal qualifications to contract with the State (includes being properly licensed).*

E. Supplied all necessary information in connection with the inquiry concerning responsibility; and

F. No record of debarment from participation in construction projects in past 3 years from any state or Federal agency as recorded in the federal government's System for Award Management (SAM). This can be found at <https://www.SAM.gov> .

6.11.2 Verify Proper Contractor Licensing and License Limitations:

A. Before posting the SE-370, the Agency must verify that the Bidder and its listed Subcontractors *have the proper contractor's license and license limitations*, and they were in effect at the time of bidding.

B. *If the Agency determines that a Bidder or one of its listed Subcontractors does not have the proper license and license limitations, the Agency must declare the Bidder is non-responsible.* The Agency should notify the SC Contractors' Licensing Board that the Bidder or Subcontractor is offering to perform work without a proper license. The Agency may contact the Contractors' Licensing Board at: <https://lir.sc.gov/clb/> .

(emphasis added).

Therefore, contrary to the Appellants-Respondents' position, the Department is legally charged by the Office of the State Engineer's⁶ regulations and related manual to make determinations of responsibility which includes "license limitations" and at times involve evaluations of construction project cost allocation to determine licensing percentages. *See* S.C. Code Ann. § 11-35-3020(b)(i)(1976 & Supp. 2025). The Panel reconciled this in explaining: "When a responsibility determination requires application of a statute administered by another state agency, the procuring agency must apply that statute in evaluating bidder responsibility." (R.p. _____, Order p.8). The Department's legal interpretation of licensing provisions in the

⁶ Please note that the Chief Procurement Officer for Construction, Appellant-Respondent, is also the State Engineer. (CPO Brief at p. 1).

context of the Procurement Code does have a sound legal basis and the Panel gave proper consideration to the Department's construction of such standards. Finally, the CPO largely concedes this point in its brief. (CPO Brief, p. 13 n. 7).

Second, the determination of responsibility, and more specifically "proper license and license limitations," necessarily requires project-specific facts and application of professional expertise to determine cost allocations for evaluating a bidder's licensing percentages. See S.C. Code Ann. §§11-35-1810(2) and 11-35-3020(b)(i); S.C. Regs. 19-445.2125(D); S.C. Regs. 19-445.2145(F); and Office of State Engineer OSE Manual "MANUAL FOR PLANNING AND EXECUTION OF STATE PERMANENT IMPROVEMENTS" (2023) – Section 6.11 Determination of Bidder's Responsibility. As such, the licensing determinations required of the Department and later reviewed by the Panel are not purely questions of law. *See* S.C. Code Ann. § 11-35-2410(A) ("The determinations required by the following sections and related regulations are final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law"); *Guerard v. Whitner*, 276 S.C. 521, 523, 280 S.E.2d 539, 540 (1981) ("Judicial discretion in a non-judicial field would be substituted for that of the appropriate administrative agency. This we cannot do."). The Panel correctly acknowledged this when describing the facts and expertise involved in the Department's responsibility determination. (R.p. _____; Order pp.3-4,8-9,13). After discussing several relevant factual considerations, the Panel agreed with the Department's factual conclusion on the licensing and not that of Appellant-Respondents. (R.p. _____; Order pp.12, 14, 15). Therefore, the assertions that the licensing question is purely one of law and that the panel blindly deferred to the Department does not reflect the Panel's review role or what occurred in this instance.

Finally, to the extent the Appellant-Respondents claim the Department is not permitted to make an interpretation or application of section 40-11-410(5)(f) because it is outside of the procurement framework, it would follow that the Panel might also lack the authority or a “the duty to interpret the scope” of that section as suggested by Appellants-Respondents. (CPO Brief p. 14). However, a substantial error in the argument of Appellants-Respondents is that the Procurement Code already expressly authorizes a procuring agency to make determinations on the needed license classifications and subclassifications. Specifically, that section provides:

The governmental body, in consultation with the architect-engineer assigned to the project, *shall identify by license classification or subclassification* in the invitation for bids all subcontractors who are expected to perform work for the prime contractor to or about the construction when those subcontractors' contracts are each expected to exceed three percent of the prime contractor's total base bid. In addition, the governmental body, in consultation with the architect-engineer assigned to the project, *may identify by license classification or subclassification* in the invitation for bids a subcontractor who is expected to perform work which is vital to the project. *The determination of which subcontractors are included in the list provided in the invitation for bids is not protestable pursuant to Section 11-35-4210 or another provision of this code.*

S.C. Code Ann. § 11-35-3020(b)(i)(emphasis added).

In any event, the Panel did properly contemplate the legal requirements of section 40-11-410(5)(f) in the context of a responsibility determination under the Procurement Code as discussed above. (R.p. _____; Order pp.9-14). Appellants-Respondents don't approve of the outcome of the Panel's decision or how the Panel expressed the basis for its affirmation of the Department decision, but that does not establish the error being claimed. Interestingly, the final sub-argument of the CPO contains no outside legal authorities to support its position and only highlights factual considerations. (CPO Brief p. 14). As mentioned above, the Panel discussed several factual elements relevant to the cost allocation for determining licensing percentages required to make a responsibility determination. Thus, the Panel did conduct an appropriate review

of the responsibility determination, inclusive of a proper legal framework and consideration of evidence in the record before giving proper deference to the Department's decision.

II. The Panel conducted an appropriate review under section 11-35-2410(A) before reversing the CPO's license classification decision.

Similar to the arguments dispelled above, the Appellant-Respondents' again try to assign error to the Panel by claiming the root dispute to be a question of law while ignoring section 11-35-2410(A) and the crucial factual elements. The goal of doing so is to shift focus solely to the *de novo* standard that is not controlling in the review of the Department's non-responsibility conclusion.⁷ See S.C. Code Ann. § 11-35-2410(A) ("The determinations required by the following sections and related regulations are final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law"); cf. 11-35-4410(1) (creating the Procurement Review Panel "to review and determine *de novo*" requests for review of CPO decisions). However, the more specific standard of section 11-35-2410(A) controls in review of the non-responsibility determination and displaces the general *de novo* standard of section 11-35-4410(1). Even where the *de novo* standard may apply within a responsibility determination or as a collateral matter, the Panel is not prohibited from giving deference to the agency.⁸

As noted above, the Panel explained itself with the following:

Although appeals to the Panel are conducted *de novo*, responsibility determinations remain subject to the standard of review set forth in § 11-35-2410(A). The Panel therefore does not decide which contractor license classification it would

⁷ In the CPO's brief, it acknowledged the application of section 11-35-2410(A) in the Standard of Review section (CPO Brief p. 8) and then shifts to section 11-35-4410(1) in argument II. (CPO Brief p. 15).

⁸ Even with the recent changes in section 1-23-380(5)(b), the actions of the Panel are not affected by that subsequent change in law which would only attach now at this judicial level of review and only to questions of law.

independently select, but whether DNR's determination lacked a rational basis or was contrary to law.

(R.p. _____, Order p.11)

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.

(R.p. _____, Order p.12). Consistent with the Department's prior arguments, the disputed aspects of the non-responsibility determination in this appeal are not purely questions of law and the Panel's navigation and treatment of the standards of review prescribed by statute were warranted. *See Guerard v. Whitner*, 276 S.C. 521, 523, 280 S.E.2d 539, 540 (1981)("Judicial discretion in a non-judicial field would be substituted for that of the appropriate administrative agency. This we cannot do."). Appellants-Respondents have not demonstrated the Panel, or Department's decision of Paragon's non-responsibility, are "clearly erroneous, arbitrary, capricious, or contrary to law" and the Panel identified the substantial evidence supporting the Department's determination.

Furthermore, Appellant-Respondents adopt a position that *de novo* review prohibits any deference. (CPO Brief p. 15 and Paragon Brief p. 12). However, even when the Panel needs to do so outside of a non-responsibility situation, *de novo* review does not preclude a reviewing body from recognizing expertise and professional judgment or even insight into legal interpretation by an administrative agency. *Jack's Custom Cycles, Inc. v. S.C. Dep't of Revenue*, 439 S.C. 35, 48, 885 S.E.2d 433, 440 (Ct. App. 2023)("Questions of law are reviewed *de novo*; however, this court generally gives deference to an agency's interpretation of its own statutes and regulations."); *Be Mi, Inc. v. S.C. Dep't of Revenue.*, 408 S.C. 290, 300-301, 758 S.E.2d 737, 742 (Ct. App. 2014)("Although our review of these questions is *de novo*, we will generally give deference to an agency's interpretation of its own regulation."); *see also State v. Whitner*, 399 S.C. 547, 552, 732

S.E.2d 861, 864 (2012) (explaining that questions decided under de novo review may be decided without any deference to the court below); *State v. Taylor*, 411 S.C. 294, 299, 768 S.E.2d 71, 74 (Ct. App. 2014) (“Moreover, [q]uestions of statutory interpretation are questions of law, which are subject to de novo review and which we are free to decide without any deference to the court below.”)(citing *City of Greer v. Humble*, 402 S.C. 609, 613, 742 S.E.2d 15, 17 (Ct.App.2013)); 73A C.J.S. Public Administrative Law and Procedure § 568 Technical, expert, or scientific evidence as subject to judicial reevaluation on review of agency action (April 2026 Update)(“Ordinarily, in a proceeding before an administrative agency which involves technical and scientific evidence, the credibility of expert witnesses and the weight to be attached to their testimony are matters exclusively for the agency, and the findings of the agency, if supported by substantial evidence, should not be disturbed by a reviewing court.”); 1 State Env'tl. L. § 15:48 (2025-2026). The deference principle (Dec. 2025 update)(discussing elements of court deference to agency experience, technical knowledge, and balancing of legal, technical and policy factors and noting “courts often refer to them interchangeably”).

Therefore, to the extent the Panel partially evaluated its evaluation under section 11-35-2410(A) of the Department’s position as deference, there simply is no prohibition or legal error in assigning this weight or respect to the Department’s non-responsibility determinations or any collateral decisions.

III. The Panel correctly affirmed that Paragon was non-responsible based on license subclassification and percentage.

“Paragon is properly licensed under the plain meaning of § 40-11-410(5)(f)” but “the statute is not elegantly drafted.” (CPO Brief, pp. 17-18). These are the contradictory assertions in

the final argument of the CPO. However, the Panel correctly performed its statutory duty in reviewing the Department's non-responsibility determination, including that Paragon lacked the necessary license classification or percentage.

Taking into consideration the elements of the plumbing subclassification and the percentage requirements, the Panel properly concluded the Department's determinations were legally justified and supported with substantial evidence. S.C. Code Ann. §§ 40-11-340 and - 410(3)(c) & (5)(f). As reflected in the excerpts below, the Panel considered all relevant facets to the dispute under review.

DNR relied on the engineer of record's opinion of cost and allocation of project costs by license classification contained in the administrative record. The estimate separated licensed construction work from non-licensed project costs, including contractor overhead and profit, insurance and bonds, engineering during construction, and third-party inspections. PRP000074. Based on that review, DNR issued a written determination dated October 17, 2025, concluding that Paragon was non-responsible – and therefore ineligible for award – because it did not satisfy the contractor licensing requirements of Title 40 of the South Carolina Code. PRP000066.

(R.p. _____, Order p.3)

Panel precedent likewise recognizes that responsibility determinations are made by the procuring agency. The Panel has explained that “[t]he responsibility inquiry is delegated to the procuring agency and the Panel takes the position that review of this issue is limited to whether the procuring officer's determination was clearly erroneous, arbitrary, capricious, or contrary to law.” In re Value Options, Case No. 2001-7, at 7 (S.C. Procurement Rev. Panel Aug. 3, 2001).

(R.p. _____, Order p.6-7)

Because the ability to lawfully perform the work required by the solicitation is part of a bidder's legal capacity to perform the contract, questions concerning applicable contractor licensing requirements may properly arise during a procuring agency's responsibility determination.

(R.p. _____, Order p.8)

Accordingly, determining whether the work required by a solicitation falls within a particular contractor license classification is part of the procuring agency's responsibility determination. Such determinations are "final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law." S.C. Code Ann. § 11-35-2410(A).

(R.p. _____, Order p.9)

Because DNR's determination that eighty percent of the Project required WL licensure aligns with the components described in § 40-11-410(3)(c) and reflects the agency's technical expertise, it had a rational basis and was not clearly erroneous, arbitrary, capricious, or contrary to law.

(R.p. _____, Order p.13)

Responsibility determinations fall within the discretion of the procuring agency, and state agencies possess broad authority to make such procurement judgments. *Value Options*, at 6.

(R.p. _____, Order p.13)

Under the substantial evidence standard governing administrative review, a reviewing body does not reweigh technical evidence or substitute its judgment for competing expert evaluations. See *Murphy*, 396 S.C. at 639; *Lark*, 276 S.C. at 135; *Rhame*, 415 S.C. at 167. The inquiry is whether the agency's determination is supported by evidence from which reasonable minds could reach the same conclusion. Because DNR relied on a professional engineering estimate contained in the administrative record, its determination that Paragon did not satisfy the statutory requirements for sole prime eligibility is supported by substantial evidence.

(R.p. _____, Order p.14)

Again and in support of the Panel's affirmation, the elements of this project, including over a mile of 10" piping, 12" and 24" piping, and 10" and 12" valves, among the other elements, simply exceed the qualifications of a plumbing subclassification when making comparisons between the PB and WL classifications. See S.C. Code Ann. § 40-11-410(3)(c) and (5)(f). The CPO claims these are part of a "water supply system" but the statute and associated regulations do not define the term or distinguish those substantial features from a "water main" that is the province of the

WL license. (CPO Brief, p. 18); S.C. Code Ann. § 40-11-410(3)(c). Furthermore, even if some elements of the project are small enough to be deemed appropriate for the plumbing subclassification, the percentage of such elements are insufficient under section 40-11-340 as determined by professionals who best understand the technical considerations of the project, as recognized by the Panel. (R.p.____; Order pp. 3 & 13).

The CPO raised an additional argument in the conclusion of its brief which is perhaps his root concern. It claims “an agency will be free to interpret contractor licensing laws with almost a ‘hands off’ level of discretion.” (CPO Brief at pp. 21-22). These fears appear to be legally and factually unfounded especially given that the CPO and State Engineer are the same person. The Procurement Code, regulations, and OSE MANUAL FOR PLANNING AND EXECUTION OF STATE PERMANENT IMPROVEMENTS, give the State Engineer a substantial and active oversight role in procurement actions such as the one underlying this appeal. S.C. Code Ann. § 11-35-830(“All procurements involving construction, architectural and engineering, construction management, and land surveying services, as defined in section 11-35-2910, and any pre-procurement and post-procurement activities in this area, must be conducted in accordance with the "Manual for Planning and Execution of State Permanent Improvements" and with any regulations promulgated by the board, unless otherwise provided in this code by specific reference to the State Engineer's Office.”). *See also* S.C. Code Ann. §§ 11-35-1010(“The chief procurement officers shall maintain a close and cooperative relationship with the using agencies.”); 11-35-1220(“the chief procurement officers shall prescribe forms to be used by the using agencies in requisitioning, ordering, and reporting supplies, services, information technology, and construction.”); 11-35-2010(2)(b)(“The chief procurement officers may develop contracting documents for their respective areas of responsibility.”); S.C. Code Regs. § 19-445.2145(F)(“Part

II of this manual, covering the procurement of construction for the projects, will be the responsibility of the Office of the State Engineer.”); Office of State Engineer OSE Manual “MANUAL FOR PLANNING AND EXECUTION OF STATE PERMANENT IMPROVEMENTS” (2023) – Section 1.3.1(“The SC Consolidated Procurement Code and other Statutory Provisions require OSE to prepare and maintain the Manual for Planning & Execution of State Permanent Improvements. According to section 11-35-830, all procurements involving construction and construction-related design services, including any pre- and post- procurement activities in this area, must be conducted in accordance with the Manual for Planning and Execution of State Permanent Improvements.”). Additionally, the procuring agencies are already authorized by the Procurement Code to make determinations on license classifications and subclassifications. S.C. Code Ann. § 11-35-3020(b)(i). Furthermore, the record reflects agency collaboration with OSE and that OSE staff specifically reviewed and approved several documents at key stages of the procurement process. Those documents include: Invitation for Design-Bid-Build Construction Services (SE-310)⁹, Request for Concurrence in Posting Notice of Intent to Award Design-Bid-Build Contract (SE-360) with supporting documentation, and Notice of Intent to Award- Design-Bid-Build Contract (SE-370). (R.p.____; PRP 66, 67, 70-73, 84 and SCDNR Memo to Court and Affidavit of Jeff Boyer, Request for Concurrence in Posting Notice of Intent

⁹ It is noteworthy that the OSE has recently revised form SE-310 to require agencies to identify the license type of the prime contractor. The new field is “PRIME CONTRACTOR LICENSE (SPECIAL STANDARD OF RESPONSIBILITY):____.” See Office of State Engineer OSE Manual “MANUAL FOR PLANNING AND EXECUTION OF STATE PERMANENT IMPROVEMENTS” (2023) – APPENDIX B – SE-310 form – Invitation for Design-Bid-Build Construction Services. To the extent use of these forms are legally required as discussed above, this change is the equivalent of a change in law executed by the State Engineer / CPO and would appear to negate some arguments of Appellants-Respondents.

to Award Design-Bid-Build Contract). Therefore, the argument of a runaway agency is simply not supported in law or fact.

Accordingly, the Panel did not err in rejecting the Appellants-Respondents' claims about the Department's non-responsibility determination that Paragon lacked the necessary license classification or percentage.

IV. Paragon's desired procurement remedies are not available under applicable law.

The Department addressed this issue in its Appellant's Brief and therefore incorporates those arguments by reference. However, to the extent the CPO has asserted that S.C. Code Ann. § 11-35-4315 (1976 & Supp. 2025) and regulation 19-445.2015 prescribe the available remedy if a violation of the Procurement Code were found, the Department offers this response. Even if the remedies under that pair of authorities are available in the context of this appeal, they would still require a remand to the Department to "decide to either ratify the contract in accordance with this regulation or acknowledge and declare the contract null and void" under Regulation 19-445.2015. As such, the forced remedies sought by Paragon are also not supported under the framework outlined by the CPO.

CONCLUSION

Based upon the foregoing arguments, the Department respectfully asserts that the Department lawfully and properly performed the solicitation and award underlying this appeal and that the Panel's confirmation of that decision was lawful, appropriate, and supported by substantial evidence. To the extent this honorable Court does not find jurisdiction lacking or that this appeal is otherwise barred, the Department asserts as an alternative that the decision of the Procurement Review Panel should be affirmed.

Respectfully submitted,
s/ Van Whitehead

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¹⁰ On behalf of the Department, I would like to acknowledge and thank our volunteer Law Clerk Caroline Koontz for her valuable contributions to the preparation of this brief.