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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
Panel 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.

FINAL BRIEF OF RESPONDENT HAREN CONSTRUCTION CO., INC.

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I. Whether the Panel independently interpreted S.C. Code Ann. § 40-11-410(5)(f) *de novo*, without deferring to SCDNR on a question of law;

II. Whether substantial evidence supports the Panel's determination, given that it rests on the only record evidence allocating costs among the relevant license subclassifications; and

III. Whether Appellants can establish that fifty-one percent of the work requiring licensure, measured by construction cost, falls within the Plumbing subclassification, given the undisputed presence of manholes and utility vault structures in the Project's piping network.

STATEMENT OF THE CASE

This appeal arises from a well-reasoned order of the South Carolina Procurement Review Panel (the "**Panel**") reversing the Chief Procurement Officer's ("**CPO**") decision sustaining Paragon's bid protest in connection with a South Carolina Department of Natural Resources ("**SCDNR**") construction project.

I. THE PROJECT

On August 12, 2025, SCDNR issued a solicitation for bids on Project No. P24-6052-PG, the Beaufort Waddell Mariculture Maturation Ponds Maintenance Project (the "**Project**"). (R. 1045, 1067). The Project involves renovation of hatchery infrastructure on DNR property, including rehabilitation of rearing ponds, replacement of piping networks, modifications to the holding tower, upgrades to site electrical systems, and related improvements. (R. 1175).

For the Project to function as intended and designed, seawater is pumped into an elevated concrete holding tower, from which it is released through a series of valves and conveyed by gravity to several in-ground ponds via a network of underground yard piping. (R. 1051). Seawater is held in the ponds for fish maturation, then drained into a concrete outlet structure where the fish are harvested. (R. 1051). The drained seawater is subsequently discharged into a drainage ditch and returned to the saltmarsh. (R. 1051).

The Project's technical specifications require, among other things, that the prospective contractor furnish all materials and labor necessary to perform "setting of utility structures to grade, setting of precast concrete curb[s,] grouting around pipe at manholes, manhole bases, and general repairs caused by utility Work." (R. 1284). The Project drawings for yard piping require a pressurized system cleanout to grade (PCOTG) on new yard piping mains every 500 feet, (R. 1456), and detail Sheet GC-2 calls for a precast concrete box with a H-20 load rated traffic cover (i.e., a manhole) to be installed at each PCOTG location. (R. 1453, 1459). Because the Project's design calls for approximately 8,500 linear feet of yard piping, it therefore requires approximately seventeen manholes within the yard piping system alone. (*See* R. 1454–1459). In addition, the Project's design calls for a precast utility vault to be installed outside each of the maturation ponds, with HS-20 load rated traffic covers and ladder rungs approved by OSHA & ANSI. (*See* R. 1453, 1460). Each precast utility vault functions similarly to a manhole, providing access to valves and piping at the pond and bringing the total number of precast utility vault and manhole structures to twenty-two. (*See* R. 1453, 1460.)

II. THE PARTIES AND RELEVANT LICENSE SUBCLASSIFICATIONS

Haren is a construction firm specializing in engineered water improvement projects, including water treatment plants, wastewater treatment plants, pumping stations, raw water impoundments, pipeline construction, and other water-related projects. (R. 987). Relevant to this appeal, Haren holds a South Carolina General Contractors-Public Utility license with a Water and Sewer Lines subclassification ("**WL**"). S.C. Code Ann. § 40-11-410(3)(c) sets forth the scope of work covered by the WL subclassification:

> construction work on water mains, water service lines, water storage tanks, sewer mains, sewer lines, lift stations, pumping stations and appurtenances to water storage tanks, lift stations, pumping stations, pavement patching, backfill, and erosion control as a part of construction, and which includes connection at the building of all lines to the appropriate lines contained in commercial structures, ***installation and repair of a project involving manholes***, the laying of pipe for storm drains and sewer mains***, all necessary connections, and excavation and backfilling, and concrete work incidental thereto***.
>
> . . . General contractors in this license subclassification may not engage in water and sewer line work from the right-of-way to a residential structure unless the entity is a subcontractor to a licensee holding a plumbing subclassification.

(emphasis added).

Paragon advertises itself as offering commercial, residential, and multi-family construction services. (R. 988). Paragon does not hold a WL License. Rather, Paragon holds a South Carolina Mechanical Contractors license with subclassifications in Plumbing ("**PB**") and Electrical ("**EL**"). S.C. Code Ann. § 40-11-410(5)(f) sets forth the scope of work covered by the PB subclassification:

> the installation, replacement, alteration, and repair of all plumbing including solar water heating when performed solely within property lines and not on public easements or rights-of-way except to make connections to water meters or sewer taps as allowed by the utility owner; and the installation, alteration, and repair of all piping, fixtures, and appliances related to water supply, including pressure vessels and tanks, ***and excluding municipal or related water supply systems***; venting and sanitary drainage systems for all fluid and semi-fluid and organic wastes; roof leaders; water-conditioning equipment; piping and equipment for swimming pools; ***and installation of a system of pipes, fittings, fixtures, drains, and all necessary component parts upon the premises or in a building to supply water to buildings and to convey sewage or other waste products from buildings***.

(emphasis added).

III. SCDNR'S RESPONSIBILITY DETERMINATION AND PARAGON'S PROTEST

SCDNR structured the solicitation and bid documents to seek bids for a sole prime contractor[1] to construct the Project but did not specify a required contractor license classification. (R. 1088–1089). SCDNR received bids for the Project from Haren and Paragon, and Paragon was the apparent low bidder. (R. 1046).

During its responsibility review,[2] SCDNR evaluated the Project plans, specifications, and a line-item cost estimate prepared by the engineer of record (the "**Design Cost Estimate**"). (R.

[1] A prime contractor "is an entity which contracts directly with an owner to perform general or mechanical construction." S.C. Code Ann. § 40-11-20(20). A sole prime contractor is "the prime contractor for a project on which there is only one prime contractor." S.C. Code Ann. § 40-11-20(24).

[2] A responsibility determination is a determination that the bidder has the legal and technical ability to perform. *See* S.C. Code Ann. Regs. 19-445.2125(A)(1). "[T]he lack of a proper license to do the work solicited in a state contract will always render a bidder nonresponsible." *Protest of Roofco, Inc.*, Panel Case No. 2000-14(I), 2001 WL 34058940. *See also* S.C. Code Ann. § 40-11-

999, 1057). This estimate was the analytical basis for determining what percentage of the Project's cost was attributable to each relevant license subclassification—and, in turn, which bidders were eligible to serve as sole prime contractor.[3] The Design Cost Estimate allocated eighty percent of the Project's cost for work requiring licensure to the WL subclassification. (R. 1057). It is the only record evidence allocating the Project's total construction cost among license subclassifications by percentage.

SCDNR also sought guidance from the Contractor's Licensing Board within the South Carolina Department of Labor, Licensing and Regulation (the "**LLR**") regarding the required licensure for the Project. The LLR initially declined to issue a license subclassification determination but ultimately advised that "the Water & Sewer Line classification is more than likely what is required." (R. 1053–1056).

On October 17, 2025, SCDNR informed Paragon of its determination that Paragon was a non-responsible bidder pursuant to S.C. Code Ann. § 11-35-1810. (R. 1049). Relying on the Design Cost Estimate, SCDNR determined that eighty percent of the Project falls within the WL subclassification. (R. 1049). Because an entity licensed under S.C. Code Ann. § 40-11-410(5)(f) (PB) may bid and perform work as sole prime contractor only if fifty-one percent or more of the

200(B) ("It is a violation of this chapter for an awarding authority . . . to consider a bid . . . unless the bidder has first obtained the licenses required by this chapter.").

[3] S.C. Code Ann. § 40-11-340 sets forth the licensure requirements for an entity to serve as a sole prime contractor. Relevant to this appeal, an entity holding a license subclassification under S.C. Code Ann. § 40-11-410(3), which includes WL, may serve as a sole prime contractor if forty percent or more of the work, as measured by total construction cost, falls under that subclassification. An entity holding a license subclassification under S.C. Code Ann. § 40-11-410(5), which includes PB and EL, may serve as a sole prime contractor if fifty-one percent or more of the work, as measured by total construction cost, falls under those subclassifications.

work falls under that classification, Paragon was not permitted to act as sole prime contractor for the Project. (R. 1049 (citing S.C. Code Ann. § 40-11-340)).

On October 20, 2025, SCDNR posted a notice of its intent to award a contract for the Project to Haren for the base bid work plus the work of alternate 1, which added a fifth maturation pond to the Project's scope. (R. 1050).

On October 27, 2025, Paragon filed a notice of intent to protest with the CPO. (R. 1037). In its notice, Paragon asserted that fifty-three percent of the Project for "yard piping from head tower to ponds" falls within its PB subclassification, but it submitted no independent engineering analysis or line-item cost breakdown to support that figure. (R. 1041).

On October 30, 2025, SCDNR responded to Paragon's notice of intent to protest, explaining that, based on the engineer of record's Design Cost Estimate, eighty percent of the Project's cost for work requiring licensure required a WL subclassification. (R. 1052). SCDNR further explained that the PB subclassification was not appropriate for the Project because S.C. Code Ann. § 40-11-410(5)(f) limits that subclassification to the supply of water "to buildings," and the Project did not involve the construction or renovation of any buildings. (R. 1052). SCDNR's response also noted that the LLR had issued a citation to Paragon on August 4, 2025, for performing contract work and submitting a bid without proper licensure. (R. 1052, 1461).

On November 4, 2025, Paragon filed its formal protest. (R. 1007). Paragon again asserted that fifty-three percent of the Project falls within its PB subclassification but did not submit any independent engineering or line-item cost analysis to support that figure. (R. 1009).

IV. THE CPO'S PROTEST DECISION

On November 19, 2025, the CPO granted Paragon's protest. (R. 998). The CPO found that neither the WL nor the PB subclassification expressly excludes water and drainage line work of the type required by the Project, and that both subclassifications instead contain language that appears to encompass such work. (R. 1003). In reaching this conclusion, the CPO relied solely on the text of S.C. Code Ann. §§ 40-11-410(3)(c) (WL) & 40-11-410(5)(f) (PB). (R. 1003). Notably, the CPO did not address the Design Cost Estimate or otherwise attempt to allocate any percentage of the Project's cost to the relevant license subclassifications. The CPO nonetheless granted Paragon's bid protest and remanded the matter to SCDNR to proceed in accordance with the Procurement Code. (R. 1004).

V. THE PANEL'S ORDER

Haren timely sought further administrative review of the CPO's Protest Decision pursuant to S.C. Code Ann. § 11-35-4210(6). (R. 985). The Panel deliberated on February 25, 2026, and issued its final Order on March 13, 2026, reversing the CPO. In doing so, the Panel independently interpreted S.C. Code Ann. §§ 40-11-410(3)(c) (WL) & 40-11-410(5)(f) (PB), reasoning that neither subclassification, as applied to the Project's mariculture infrastructure, compelled a single subclassification as a matter of law. (R. 72).

Faced with two potentially permissible licensing subclassifications, the Panel looked to the only record evidence allocating Project cost between them: the engineer of record's Design Cost Estimate, which attributed eighty percent of the Project work to the WL subclassification. (R. 74–75). The Panel found that although Paragon bore the burden of proving that at least fifty-one percent of the Project falls within the PB subclassification, Paragon failed to submit any competing engineering estimate or line-item cost analysis demonstrating that the Design Cost Estimate was factually unsupported or artificially structured. (R. 72, 75). The Panel therefore concluded that SCDNR's responsibility determination was not clearly erroneous, arbitrary, capricious, or contrary to law, and remanded to SCDNR to proceed in accordance with the South Carolina Consolidated Procurement Code ("**Procurement Code**"). (R. 75–76).

Paragon and the CPO subsequently moved for reconsideration, which the Panel denied. (R. 77–79). Paragon initiated this appeal on April 9, 2026, and the CPO joined the appeal on April 13, 2026. Paragon then moved before the Panel to stay the relief it had ordered pending resolution of the appeal, seeking to prevent Haren from commencing performance under the contract. The Panel denied the motion. (R. 80–81).

VI. CONTRACT AWARD AND STAY

On April 22, 2026, Paragon moved before this Court to stay the relief ordered by the Panel pending resolution of the appeal. Haren filed a return opposing the motion on April 30, 2026, explaining that the relief Paragon sought—an award of the contract or a re-bid—was no longer available under the South Carolina Procurement Code because the contract had already been awarded to Haren. On May 7, 2026, the Court entered a temporary stay and directed the parties to submit memoranda addressing whether SCDNR had awarded the contract to Haren.

In its memorandum, submitted May 15, 2026, Haren explained that the contract was "awarded" to, and formed with, Haren no later than May 4, 2026, when SCDNR returned the fully executed contract documents. Haren further noted that although the contract documents listed May 22, 2026, as the effective date, the solicitation expressly provided that the successful bid would be accepted, and the contract formed, upon execution of the contract documents. On May 20, 2026, the Court stayed the Panel's relief pending resolution of the appeal. Haren petitioned the full Court for review of that order on May 29, 2026. That request for review remains pending.

STANDARD OF REVIEW

This appeal involves mixed questions of law and fact, and different standards of review govern each. When reviewing an appeal from a decision of the Panel, the Court "may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5). The Court may affirm the Panel or remand the case for further proceedings. *Id.* As relevant here, the Court may only disturb the Panel's decision if it is in violation of statutory provisions; predicated upon an error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; arbitrary or capricious; or characterized by abuse of discretion. *Id.* § 1-23-380(5)(a), (d), (e), (f). The Court's review must be confined to the administrative record. *Id.* § 1-23-380(4).

"Statutory interpretation is a question of law. But whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard." *Hopper v. Terry Hunt Const.*, 373 S.C. 475, 479–80, 646 S.E.2d 162, 164–65 (Ct. App. 2007), *aff'd*, 383 S.C. 310, 680 S.E.2d 1 (2009) (citation omitted). Here, the scope and meaning of the licensing subclassifications in S.C. Code Ann. § 40-11-410 is a question of statutory interpretation, reviewed *de novo*. But what percentage of the Project's specialized mariculture infrastructure, as measured by construction cost, fits within each of those subclassifications is a question of fact, reviewed under the substantial evidence standard. *See Bursey v. S.C. Dep't of Health & Envtl. Control*, 369 S.C. 176, 184–85, 631 S.E.2d 899, 904 (2006), *overruled on other grounds by Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011) (recognizing the meaning of a statutory term is a question of law, but whether a gas and electric company's activities met this definition is a question of fact).

As to that factual question, "judicial review of administrative agency orders is limited to a determination [of] whether the order is supported by substantial evidence." *MRI at Belfair, LLC v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 1, 6, 664 S.E.2d 471, 474 (2008). When finding substantial evidence to support the Panel's decision, "the Court need only determine that, based on the record as a whole, reasonable minds could reach the same conclusion." *Murphy v. S.C. Dep't of Health & Env't Control*, 396 S.C. 633, 639, 723 S.E.2d 191, 194–95 (2012). The "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

SUMMARY OF THE ARGUMENT

Appellants cannot escape an unfavorable factual finding by recasting it as legal error. The Panel independently interpreted § 40-11-410 and then resolved the dispositive factual questions based on the only cost-allocation evidence in the record.

First, the Panel committed no error of statutory interpretation: it did not defer to SCDNR's view that the PB subclassification was categorically inapplicable because the Project does not involve buildings. Instead, it independently construed § 40-11-410 and determined that the statute, as applied to the Project's specialized mariculture infrastructure, does not compel a single license subclassification as a matter of law. PB therefore could have been a permissible subclassification for some portion of the Project.

That independent statutory interpretation, however, left a dispositive factual question unresolved. To prevail, Paragon still had to prove that at least fifty-one percent of the Project, measured by construction cost, falls within the PB subclassification. Paragon failed to carry that burden.

Second, the Panel's finding that eighty percent of the Project's cost for work requiring licensure falls within the WL subclassification is supported by substantial evidence because it rests on the Design Cost Estimate—the only evidence in the record allocating Project costs among the relevant licensing subclassifications. Appellants offered nothing to rebut that evidence below: no competing engineering analysis, no cost breakdown, no documentation. Paragon's unsupported protest-letter assertion that fifty-three percent of the Project falls within the PB subclassification cannot substitute for proof.

Appellants' belated attempts to reallocate cost categories and recalculate percentages for the first time on appeal are not properly preserved. Appellants cannot replace the evidentiary record with percentage calculations developed by counsel for the first time on appeal, and their shifting percentage figures confirm that their current theory was never presented or tested below. Because Paragon failed to carry its burden of proving that at least fifty-one percent of the Project's cost falls within the PB subclassification, the Panel's decision should be affirmed.

The Project's manholes and integrated utility structures provide an additional reason to reject Appellants' new percentage calculations. The Project's seventeen manholes and five functionally equivalent utility vaults cannot be performed exclusively under the PB subclassification, and the Project's resemblance to a "municipal or related water supply system" falls squarely within the PB subclassification's express statutory exclusion. Appellants assign entire piping categories to the PB subclassification even though those categories necessarily include work expressly covered by WL. Their calculations therefore do not establish that fifty-one percent of the Project falls within the PB subclassification, even if the Court were to consider them.

Finally, even if Appellants were able to establish reversible error, the Court cannot redirect the award to Paragon or cancel Haren's contract. Because the contract was awarded before the stay, the proper disposition would be for the Court to remand to SCDNR for application of the Procurement Code's post-award remedial framework.

ARGUMENT

I. THE PANEL DID NOT DEFER TO SCDNR'S INTERPRETATION OF S.C. CODE ANN. § 40-11-410(5)(f) AND REVIEWED THE RELEVANT LICENSING SUBCLASSIFICATIONS *DE NOVO*.

The Panel did not defer to SCDNR's interpretation that S.C. Code Ann. § 40-11-410(5)(f) applies only to projects involving the supply of water to buildings. Instead, the Panel independently construed the statute and reached a different conclusion—that some portions of the Project could properly have been performed under the PB subclassification. The Panel deferred only to SCDNR's technical expertise in applying the statute to the Project's specialized mariculture infrastructure and in determining that WL was one permissible subclassification for eighty percent of the Project's cost for work requiring licensure.

Questions of statutory interpretation are reviewed *de novo* and without deference to the lower tribunal. *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). The Panel did exactly that. Its independent statutory interpretation is evident in its conclusion that the WL and PB subclassifications "describe broad categories of construction work and *do not, as applied to this mariculture infrastructure, compel a single classification as a matter of law*." (R. 72 (emphasis added)).

That conclusion reflects the Panel's own interpretation, not deference to SCDNR's position that the PB License is inapplicable because the Project does not involve buildings. The Panel also recognized that certain Project components resemble work typically performed under a PB license—a conclusion SCDNR did not reach. (R. 73).

The Panel deferred to SCDNR only on a distinct point: whether the WL License was one possible classification for the Project's complex piping network, integrated pumping components, manholes, and utility vault structures used for seawater distribution. (R. 73–74). What percentage of the Project's specialized mariculture infrastructure, as measured by construction cost, aligned with the WL subclassification, and whether that percentage met the applicable forty percent threshold, was a question of fact. *See Bursey* at 184–85, 631 S.E.2d at 904.

On that factual question, the Panel concluded that SCDNR's determination—that eighty percent of the Project's cost for work requiring licensure aligned with the components described in S.C. Code Ann. § 40-11-410(3)(c)—reflected the agency's technical expertise. (R. 74). Stated differently, SCDNR's determination that WL was *one* permissible subclassification for most of the Project was not erroneous. (R. 78). There is no dispute that the WL subclassification enables Haren to serve as the sole prime contractor for the Project. *See* CPO's Br. at 13, 15.

Critically, the Panel's reliance on SCDNR's technical expertise did not lead the Panel to conclude that WL was the *only* permissible subclassification for the Project. For instance, if the Panel deferred to SCDNR's interpretation of § 40-11-410(5)(f) and concluded that the PB subclassification is inapplicable to the Project because it does not involve buildings, then that conclusion would have crossed into impermissible deference to SCDNR on a question of statutory interpretation. But the Panel afforded SCDNR's statutory interpretation no such deference.

The Panel instead determined that the PB License could have been a permissible classification for some portion of the Project, but not a required one—a conclusion the Panel expressly reserved, noting that "this Order does not determine that WL licensure was the only possible classification for the Project." (R. 76). Because the Panel's deference concerned factual application rather than statutory interpretation, it is fully consistent with the applicable standard of review and presents no error.[4]

Although the Panel cited *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envt'l Control*, 411 S.C. 16, 766 S.E.2d 707 (2014), it did not defer to SCDNR's interpretation of § 40-11-410(5)(f). The Panel confirmed that distinction in its Order Denying Motions to Reconsider, explaining that "[t]o the extent the [March 13, 2026] Order referenced [SC]DNR's technical expertise, that discussion pertained to [SC]DNR's selection of licensing subclassifications for the Project, not the Panel's interpretation of those statutes." (R. 78). The Panel further clarified that its analysis "reflects the Panel's independent application of the governing statutes to the record rather than any deference to [SC]DNR's interpretation of law." (R. 78). That SCDNR does not administer § 40-11-410(5)(f) does not alter this analysis. The Panel's independent statutory interpretation should stand, and there is no error of law.

Paragon further contends that the Panel applied an "incomplete" standard of review by failing to consider whether SCDNR's responsibility determination was contrary to law. Paragon's Br. at 13–15. However, Paragon misstates the Panel's analysis.

The Panel's task was to review *de novo* whether Paragon met its burden to show that SCDNR's responsibility determination was "clearly erroneous, arbitrary, capricious, or contrary to law." *See* S.C. Code Ann. § 11-35-4410(1)(a); S.C. Code Ann. § 11-35-2410(A); *In re Protest*

[4] *See* S.C. Code Ann. § 11-35-2410(A); *Appeal by Coastal Rapid Public Transit Authority*, Panel Case 1992-16 ("The Panel will not substitute its judgment for the judgment of the evaluators, who are often experts in their fields[.]"). *See also* S.C. Code Ann. Regs. 19-445.2125(B) (the procurement officer may rely on any sources of information, including but not limited to "knowledge of personnel within the using or purchasing agency."); Selmi & Manaster, *State Environmental Law* § 15:48 (2025-2026 ed.) ("When a court defers to an agency's technical or scientific knowledge, in reality it is largely deferring to statements of fact and opinions of individuals within the agency.").

of Value Options, Panel Case No. 2001-7 at 7, 2001 WL 34058932. This standard necessarily encompassed review of whether SCDNR's determination was contrary to law, and the Panel conducted exactly that review, independently interpreting the statute and rejecting the conclusion urged by Appellants.

II. THE PANEL'S CONCLUSION IS SUPPORTED BY THE ONLY EVIDENCE IN THE RECORD ALLOCATING PROJECT COSTS AMONG LICENSING SUBCLASSIFICATIONS.

A. <u>Paragon failed to carry its burden to prove that fifty-one percent or more of the Project, as measured by construction cost, falls within the PB subclassification.</u>

As discussed above, the Panel interpreted S.C. Code Ann. § 40-11-410(5)(f) *de novo* and determined that PB could be a permissible subclassification for some portion of the Project. (R. 72–73). The PB subclassification, however, does not on its face encompass the entire Project—a point Appellants concede. *See* CPO's Br. at 19; Paragon's Br. at 17. Accordingly, what percentage of the Project cost fit within the PB subclassification, and whether that percentage met the applicable fifty-one percent threshold, was a question of fact. *See* S.C. Code Ann. § 40-11-340; *Bursey* at 184–85, 631 S.E.2d at 904. Paragon bore the burden of proof on that point. *In re Protest of Value Options*, Panel Case No. 2001-7, at 7.

The record contains no showing that Paragon met its burden. The Panel found that SCDNR's responsibility determination relied on the engineer of record's Design Cost Estimate, which allocated eighty percent of the Project's cost for work requiring licensure to the WL subclassification. (R. 65 (citing R. 1049, 1057). Critically, the Design Cost Estimate is the *only* evidence in the record allocating cost of the work requiring licensure among the relevant license subclassifications.

Paragon's protest asserted that fifty-three percent of the Project falls within the PB subclassification without supplying the CPO or the Panel with any analysis, supporting documentation, or evidence to substantiate its claim or meet its burden of proof. (R. 75 (citing R. 1009)). Nothing in the administrative record undermines the engineer's allocation: there is no competing engineering analysis, cost breakdown, or technical evidence suggesting error or manipulation. (R. 65, 75). Accordingly, substantial evidence supports the Panel's conclusion that SCDNR's responsibility determination was not erroneous.

The CPO argues that the Panel's Order lets agencies "choose" among license subclassifications after bid-opening, thereby avoiding an award to the lowest bidder. CPO's Br. at 15, 22. Not so. The Order simply requires a protestor to carry its burden of proof—that is, to offer more than bald, unsupported percentage assertions when challenging a responsibility determination based on license subclassification. Moreover, a responsibility determination is necessarily made *after* bid-opening but before the notice of intent to award issues, since a bidder's responsibility cannot be assessed until the bid is opened and the bidder's identity is known. *See* CPO's Br. at 6 & n.5. The Panel's Order does not authorize an agency to manipulate licensing requirements after bid opening; it requires a protestor challenging a responsibility determination to support its position with evidence. Paragon did not do so.

B. <u>Appellants' new percentage calculations were never presented below and cannot supplement the administrative record.</u>

For the first time on appeal, Appellants attempt to challenge the engineer of record's Design Cost Estimate by re-assigning individual line items to specific contractor licensing subclassifications under § 40-11-410, aggregating costs, and calculating new percentage allocations. CPO's Br. at 18–19; Paragon's Br. at 16–17.

That analysis was never presented to the CPO or the Panel and cannot now supply record evidence that Paragon failed to present during the administrative proceedings. The Court has "a limited scope of review and cannot consider issues that were not raised to and ruled on by the administrative agency." *Lee Cnty. Sch. Dist. Bd. of Trs. v. MLD Charter Sch. Acad. Plan. Comm.*, 371 S.C. 561, 566, 641 S.E.2d 24, 27 (2007).

The record confirms that Appellants never raised this challenge at any stage of the proceedings below. As the Panel expressly found, Paragon "did not submit independent engineering analysis contradicting the agency's estimate," (R. 75). The Panel further found that "the administrative record contains no competing engineering estimate or line-item cost analysis demonstrating that [SC]DNR's allocation was factually unsupported or artificially structured." (R. 65). Nor did the CPO address the Design Cost Estimate or attempt to allocate any percentage of the Project's cost to the PB subclassification in his Protest Decision.[5] And when Haren sought further administrative review before the Panel, Appellants again failed to challenge or otherwise address the Design Cost Estimate or its percentage allocations in their response briefs. That failure is fatal to this appeal.

Even if the Court were to consider Appellants' newly raised fact-driven challenge, counsel's newly created percentage allocations are not evidence and cannot substitute for the existing record. To the contrary, this Court's review is confined to the record made below. S.C. Code Ann. § 1-23-380(4). Counsel's percentage breakdown appears nowhere in the record before the CPO or the Panel; it was created for the first time in the briefing on appeal, and a party cannot supplement the administrative record through appellate argument raised by counsel. *See S.C. Dep't*

[5] By concluding that the PB subclassification permitted Paragon to perform fifty-one percent or more of the Project without allocating any percentage of the Project cost to the PB subclassification, the CPO impermissibly substituted his judgment for that of SCDNR. (R. 75).

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.").

The change in Appellants' position confirms the problem. Paragon's protest asserted, without supporting analysis or documentation, that fifty-three percent of the Project falls within the PB subclassification. The 66.8-percent figure and the methodology used to reach it appear for the first time in Appellants' briefs. Neither was presented to or tested by the CPO or Panel.

The issues subject to administrative and appellate review are defined by Paragon's protest letter, and grounds raised thereafter are untimely under S.C. Code Ann. § 11-35-4210. *See In Re: Protest of Logisticare Solutions, LLC*, Panel Case No. 2011-1 at 1, 2011 WL 7068066. These rules ensure the CPO and the Panel have the first opportunity to evaluate the evidence and arguments a party actually presents, and that a reviewing court is not asked to address arguments never raised below. A party should not be able to treat the administrative record as a rough draft and then, armed with the Panel's critique and full briefing, file a second, better-supported version of the protest on appeal. Doing so would require this Court to engage in evidentiary second-guessing of the fact finder below, which this Court has repeatedly declined to do in an array of circumstances.

Having failed to produce the evidence or analysis necessary to sustain this challenge below, Appellants now ask the Court to consider analysis and arguments that were never presented to the CPO or the Panel, and to reach a different conclusion than the Panel did. But the Court does not reweigh questions of fact. Appellants cannot use appellate briefing to supply the cost analysis missing from the administrative record. The Court should review the Panel's determination based on the evidence that was actually before it.

C. Appellants' reliance on LLR-related arguments is misplaced and irrelevant.

Appellants' focus on the LLR's informal guidance does not amount to error in the Panel's decision. *See* CPO's Br. at 11; Paragon's Br. at 13–14. Whatever role that guidance played in SCDNR's initial determination, the Panel did not treat it as a binding interpretation of § 40-11-410. The Panel independently interpreted the statute and resolved the percentage allocation based on the Design Cost Estimate. Disregarding LLR's guidance therefore would not alter the Panel's analysis or the result.

To the extent SCDNR considered the LLR's input, regardless of form, as only one of several sources of information in making its responsibility determination, SCDNR was authorized to "obtain and rely on any sources of information, including but not limited to . . . government agencies." S.C. Code Ann. Regs. 19-445.2125(B). There is no exclusion or distinction with respect to staff members of government agencies found in S.C. Code Ann. § 11-35-1810 or its implementing regulations. And, as the CPO noted in his protest decision, SCDNR took "reasonable steps" to determine the applicable licenses by contacting the LLR for guidance on which license would be required for the Project. (R. 1003).

III. THE UNDISPUTED PRESENCE OF MANHOLES AND INTEGRATED UTILITY VAULT STRUCTURES IN THE PROJECT'S PIPING NETWORK DEFEATS APPELLANTS' ATTEMPT TO RECLASSIFY ALL OF THE PIPING AS PB WORK.

Appellants do not dispute that the Project plans include manholes and related structures integrated into the Project's piping network. Yet their new percentage calculations, discussed *supra* Section II.B, assign the entire "Yard Piping" and Piping and Valves" categories to PB without accounting for the WL work included within those categories. The Project's manholes and integrated utility structures therefore provide an additional ground to reject Appellants' new percentage calculations and affirm the Panel's decision. *See* Rule 220(c), SCACR (appellate court may affirm for any reason appearing in the record).[6]

Section 40-11-410(3)(c) expressly includes within WL the "installation and repair of a project involving manholes."[7] Consistent with that language, the Panel found "Project plans reflect a complex piping network and integrated pumping components, along with manholes and utility vault structures connecting the maturation ponds' distribution system." (R. 73). Appellants do not challenge that finding or account for the manhole and utility-vault work when assigning the relevant cost categories entirely to PB.

The record confirms the scope of this work. The bid documents require at least seventeen manholes in the Project's piping network, not including the precast utility vaults at each of the ponds that function as manholes. The technical specifications further describe this work as "setting of utility structures to grade, setting of precast concrete curb grouting around pipe at manholes, manhole bases, and general repairs caused by utility Work." (R. 1284). Thus, pricing the "Yard Piping" and "Piping and Valves" categories necessarily accounts for labor, materials, and installation associated with components expressly encompassed by WL.

Appellants' calculation depends on the opposite premise. They contend that the entire "Yard Piping" and "Piping and Valves" categories qualify as "piping, fixtures, and appliances related to water supply" under PB. CPO's Br. at 19; Paragon's Br. at 17. But those categories necessarily include at least some portion of work exclusively covered by the WL subclassification.

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[6] Although Haren raised this issue below, (R. 993), the Panel did not reach it. Instead, the Panel grounded its decision in the only record evidence allocating Project costs among license subclassifications—the Design Cost Estimate.

[7] That language is broad: it is not limited to the installation and repair of manholes themselves but brings any project involving the installation and repair of manholes within the scope of the WL subclassification.

Appellants offer no explanation for excluding that work, and their briefs do not address the Panel's findings concerning the Project's manholes and utility vaults. Appellants therefore cannot reassign those categories wholesale to PB, and their appellate calculations do not establish that fifty-one percent of the work requiring licensure falls within Paragon's PB subclassification.

The PB subclassification's exclusion of "municipal or related water supply systems" underscores this conclusion. S.C. Code Ann. § 40-11-410(5)(f). The Project falls squarely within that exclusion: seventeen manholes, five functionally equivalent precast utility vaults, a force main system,[8] and roughly 10,500 feet of yard piping running basin to basin. This infrastructure serves no building, conventional plumbing fixture, or sewer treatment facility. Instead, it conveys salt water through the maturation ponds before discharging into the adjacent saltwater marsh. These features resemble utility-distribution infrastructure, not the building-oriented plumbing system PB describes, and they undermine Appellants' assumption that all piping-related work necessarily falls within that subclassification.

Because the Project is excluded from the PB subclassification on this independent basis as well, the Panel's findings should be affirmed.

IV. EVEN IF APPELLANTS PREVAIL, THE PROPER DISPOSITION IS TO REMAND TO SCDNR FOR APPLICATION OF THE PROCUREMENT CODE'S POST-AWARD FRAMEWORK.

The Panel's Order contains no error of law, is supported by substantial evidence, and should be affirmed. But even if Appellants prevail or the Court finds a violation of the Procurement Code, the pre-award remedies previously sought by Paragon are no longer available. No party disputes that the contract was "awarded" to Haren no later than May 4, 2026, when SCDNR

[8] A force main is a pressurized pipeline that relies on mechanical pumps rather than gravity to move water from a lower elevation to a higher one, and that is generally characteristic of water or wastewater utility infrastructure rather than ordinary residential plumbing.

returned the fully executed contract documents to Haren. *See* CPO's Br. at 20. Because the contract was awarded before this Court entered its stay, the Procurement Code's post-award remedial framework governs.

The CPO suggests that § 1-23-380 gives the Court some flexibility in fashioning relief, but the actual remedy proposed is reversal and remand to SCDNR for application of Regulation 19-445.2015. CPO's Br. at 20–21 & n.9. Neither Appellant identifies authority permitting the Court to redirect the award to Paragon, order a re-bid, or itself invalidate Haren's contract.

Regulation 19-445.2015 provides that, upon discovering after award that the award violated the Procurement Code, the "appropriate official"[9] must decide whether to ratify the contract, if doing so is in the State's interest, or declare it null and void. *Id.* at R. 19-445.2015(A)(1). If the contract is ratified, the appropriate official must then decide whether to continue or terminate. *Id*. at R. 19-445.2015(B).

That post-award framework is also consistent with S.C. Code Ann. § 11-35-4310(3), which governs the remedies available when the CPO or Panel determines upon administrative review that an award violated the law. It provides that "(a) the contract may be ratified and affirmed, provided it is in the interest of the State; or (b) the contract may be terminated and the payment of such damages, if any, as may be provided in the contract, may be awarded."

The critical point is that the post-award determination belongs to the designated procurement decision-maker. If the Court concludes that the award was unlawful, the proper disposition is a remand to SCDNR for application of Regulation 19-445.2015.

[9] The "appropriate official" here is "the head of the purchasing agency." *Id*. at R. 19-445.2015(G). If the contract exceeds the purchasing agency's certification or $100,000, the CPO must concur in the written determination before further action is taken unless the contract is declared null and void. *Id*.

CONCLUSION

The Panel independently interpreted the governing licensing statutes and resolved the dispositive factual question based on the only record evidence allocating costs among the relevant license subclassifications. Paragon failed to present any competing cost analysis establishing that fifty-one percent of the work requiring licensure falls within its PB subclassification. Appellants cannot cure that failure by asking this Court to adopt percentage calculations developed by counsel for the first time on appeal.

The Panel's Order contains no error of law and is supported by substantial evidence. The Court should affirm the Order and lift the stay. Alternatively, if the Court concludes that the award violated the Procurement Code, it should remand the matter to SCDNR for application of the governing post-award remedial framework.

Respectfully submitted,

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