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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 JOINT REPLY BRIEF OF APPELLANTS/RESPONDENTS PARAGON INC. OF SOUTH CAROLINA, LLC d/b/a PARAGON BUILDERS AND CHIEF PROCUREMENT OFFICER, STATE FISCAL ACCOUNTABILITY AUTHORITY

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INTRODUCTION

Paragon Inc. of South Carolina, LLC d/b/a Paragon Builders ("Paragon") and the Chief Procurement Officer, State Fiscal Accountability Authority (the "CPO") jointly submit this Reply Brief in response to the Initial Brief of Respondent Haren Construction Co., Inc. ("Haren Br.") and the Initial Respondent's Brief of SCDNR, Respondent-Appellant ("DNR Br."). Each party continues to rely on its own Initial Appellant's Brief to the extent an issue or argument is not separately addressed here.

Haren's and DNR's response briefs share a common flaw: both ask this Court to affirm a determination that Paragon's Plumbing ("PB") subclassification does not govern the Project, without ever identifying a plain-meaning reading of § 40-11-410(5)(f) that excludes the Project's yard piping and pond piping and valves. Instead, both retreat to the position that DNR's contrary preference for a Water and Sewer Lines ("WL") subclassification is owed deference — notwithstanding that the Panel's own order expressly disclaimed any role in interpreting the statute, stating that "*the relevant inquiry is not whether the reviewing body would interpret that statute*, but whether the procuring agency's application of the statute lacked a rational basis or was contrary to law under § 11-35-2410(A)." **(R. 69-70)** (emphasis added). By its own terms, the Panel treated statutory interpretation as outside its assignment — the precise error Paragon and the CPO identified in their Initial Briefs.

Haren's response brief also reveals that the very "buildings-only" reading of § 40-11-410(5)(f) it now disclaims as improper is the reading Haren itself urged the Panel to adopt below. And both Haren and DNR ask the Court to treat Paragon's and the CPO's percentage arguments as improper new evidence, even though every figure relied upon traces to the identical Design Cost

Estimate at **(R. 1057)** that DNR and the Panel used to reach the opposite conclusion. Neither argument withstands scrutiny, for the reasons below.

ARGUMENT

I. Reply to Haren's Brief

A. *The Panel Never Interpreted the Scope of § 40-11-410(5)(f) and Never Applied That Statute to the Facts.*

Haren's response brief argues that the Panel "independently interpreted" § 40-11-410(5)(f). (Haren Br. at 12). The Panel's own order contradicts this argument. The order defines the scope of the Panel's review by stating that "*the relevant inquiry is not whether the reviewing body would interpret that statute*, but whether the procuring agency's application of the statute lacked a rational basis or was contrary to law under § 11-35-2410(A)." **(R. 69-70)** (emphasis added). By its own words, the Panel believed that interpreting the statute was outside the scope of its review.

In an attempt to rehabilitate the Panel's order, Haren points to a single sentence noting that some of the Project's components "resemble work typically performed under a PB subclassification." (Haren Br. at 12, quoting **R. 73**). That sentence, buried in a paragraph addressing the plain meaning and scope of the WL subclassification, falls well short of any meaningful statutory analysis of the PB subclassification's scope. The order contains no discussion of the statute's text, structure, or purpose, and no explanation of what "components" fall within it. The Panel's failure to interpret the statute left no legal framework against which to test DNR's application of it, and no meaningful way to review whether DNR's disqualification of Paragon was contrary to law.

Finally, Haren's brief effectively admits that the Panel would have erred had it "concluded that the PB subclassification [is] inapplicable to the Project because it does not involve buildings,"

since "that conclusion would have crossed into impermissible deference to SCDNR on a question of statutory interpretation." (Haren Br. at 13). Yet that very interpretation — which Haren now belatedly acknowledges would have been improper — is the interpretation Haren itself urged the Panel to adopt. In its appeal to the Panel, Haren argued that "the PB license is primarily focused on and limited to work *involving buildings* and ancillary structures." **(R. 994)** (emphasis added). Haren argued further that the PB subclassification was inapplicable because the "Project does not involve much, if any, of the work covered by the PB license, such as work relating to the supply of water ***to buildings*** ... or a system to convey sewage or other waste products ***from buildings***." **(R. 995)** (emphasis in original).

As Paragon's and the CPO's Initial Briefs explained, the PB subclassification contains seven distinct categories of "plumbing." (Paragon Br. at 15-16; CPO Br. at 17–18). Only one of those categories is limited to piping to and from buildings; the others are not so limited, including plumbing performed within property lines generally (category one), the installation of piping and fixtures related to water supply (category two), and sanitary drainage systems for fluid and semi-fluid organic waste (category three). DNR's misinterpretation of the PB subclassification — confining it to building-related work — poisoned its application of the facts, and because the Panel never corrected that misinterpretation through its own de novo statutory analysis, it is impossible to know the extent to which the Panel's ultimate conclusion rested on this same flawed premise.

B. *Paragon Met Its Burden of Proving That DNR's Decision Was Arbitrary and Contrary to Law.*

Haren argues that Paragon failed to meet its burden of proof at the protest stage. (Haren Br. at 15–16). Paragon's protest, however, alleged that it was the low bidder on the Project and was wrongfully disqualified based on DNR's misinterpretation of the PB subclassification. **(R. 1012-1014)**. The CPO, drawing on his experience as the State Engineer, reviewed the Project

plans, drawings, and other documents and concluded that the PB subclassification was appropriate for "the water supply tank and line work of this project as well as the drainage line work." **(R. 1003)**.

Although Haren suggests that Paragon failed to submit a "competing engineering analysis, cost breakdown, or technical evidence suggesting error or manipulation," (Haren Br. at 16), no additional evidence was necessary. The evidence of the Project's nature, scope, and cost allocation was already in the administrative record.

Paragon holds a Mechanical Contractor's license. To act as sole prime contractor on a project, a contractor holding such a license needs only fifty-one percent of the total construction cost to fall within its license categories or subcategories. S.C. Code Ann. § 40-11-340. DNR itself estimated that seventeen percent of the work required an Electrical (EL) subclassification, which Paragon also holds. This meant Paragon needed only an additional thirty-four percent of the Project to fall within its PB subclassification to qualify as sole prime contractor. The Design Cost Estimate shows that at least 66.8% of the Project was allocated solely to line items consisting of pipes (HDPE or PVC) and pipe connectors and attachments (valves, tees, elbows, reducers, and knife gates). **(R. 1057)**. Combined with the undisputed 17% EL allocation, Paragon's license classifications and subclassifications cover 83.3% of the work. (See CPO Br. at 18–20). This was not a close call: Paragon amply exceeded the minimum percentage threshold under § 40-11-340.

C. *Neither Paragon nor the CPO Introduced "New" Evidence into the Record.*

Haren's brief argues that Paragon's and the CPO's cost-allocation analysis presents "newly created percentage allocations" found "nowhere in the record before the CPO or the Panel." (Haren Br. at 17–18). Neither Paragon nor the CPO introduced new evidence into the record. The Project's cost estimate appears at **R. 1057** of the administrative record, and the Panel relied on that same

estimate in reaching its decision. **(R. 74-75)**. On appeal, Paragon and the CPO challenge the conclusion drawn from that estimate, arguing that it supports — rather than refutes — Paragon's qualification. Neither party has introduced a new analytical methodology or a complex mathematical formula; each has simply reviewed an existing document and shown that DNR and the Panel drew the wrong conclusion from it. This is proper appellate argument. *See Pugh v. Piedmont Mech.*, 396 S.C. 31, 40–41, 719 S.E.2d 676, 681 (Ct. App. 2011) (remanding to the Appellate Panel of the Workers' Compensation Commission for recalculation of existing data without reopening the record for new evidence).

Nor is this simply a matter of overlooked math. A party does not "supplement the record" within the meaning of S.C. Code Ann. § 1-23-380(4) by explaining, for the first time on appeal, that the tribunal below misapplied undisputed record evidence under an erroneously construed legal standard — that is the ordinary office of appellate briefing. *See Media Gen. Commc'ns, Inc. v. S.C. Dep't of Rev.*, 388 S.C. 138, 150, 694 S.E.2d 525, 531 (2010) (rejecting an agency's interpretation where it conflicted with a statute's plain language, notwithstanding the agency's contrary application of the facts). That Paragon's protest did not, at that stage, present the identical line-item percentage breakdown ultimately offered on appeal goes, at most, to the weight this Court affords the calculation — not to whether the Court may consider the underlying, undisputed record evidence at all.

D. ***The "LLR-Related Arguments" Are Neither Misplaced nor Irrelevant.***

DNR's non-responsibility determination was supported, in part, by its reliance on a non-opinion from LLR staff. (See CPO Br. at 11). Haren argues that the "LLR-related arguments" are misplaced and irrelevant. (Haren Br. at 19). To the contrary, they show that DNR's non-responsibility determination rested on a flawed premise — in addition to DNR's misinterpretation

of the PB subclassification in § 40-11-410(5)(f). (CPO Br. at 11–12). DNR's flawed legal framework poisoned its factual application, and the Panel improperly deferred to DNR on both the law and the facts flowing from that framework.

E. *Haren's "Manhole" Argument Is a Red Herring.*

Haren argues that the Project calls for seventeen "manholes" and that this is undisputed. (Haren Br. at 19–20). The Project drawings, however, do not reference manholes.[1] The drawings instead reference a "pre-cast concrete box with traffic cover"[2] with dimensions of 16″ x 16″ x 12″ — a structure sized for arms and hands maintenance access, not full-body passage. (CPO Response to Panel Appeal at 7–8, Ex. B excerpt). These pre-cast concrete boxes are small maintenance access points, closely resembling a valve box used for a residential sprinkler system.

In any event, the manholes are a red herring. No party disputes that a WL subclassification is also appropriate for portions of the Project. No "manhole" is referenced anywhere in the cost estimate, and a review of that estimate shows that 66.8% of the Project was allocated solely to line items consisting of pipes, pipe connectors, and attachments, with no reference to pre-cast concrete boxes or traffic covers. **(R. 1057)**. Whether these boxes were folded into other line items is immaterial and does not alter the conclusion that Paragon's PB subclassification was appropriate for the bulk of the Project.

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[1]While the project specifications (as opposed to project drawings) referenced "manholes," these are merely general specifications for cast-in-place concrete. Such specifications are not customized to this specific project but instead apply as applicable across projects. The same cast-in-place specifications also list "granite curbs" and "precast concrete curbs" — two items likewise not applicable to this Project. **(R. 1284)**.

[2]Haren annotated the project drawings with the word "manhole" when it submitted them to the Panel. The CPO does not suggest Haren acted improperly in doing so — counsel was simply flagging what it considered relevant structures. A clean copy of the drawings, without counsel's annotation, appears elsewhere in the record. **(R. 95).**

Even accepting Haren's characterization of these structures, its argument would still fail as a matter of law. Section 40-11-410(3)(c)'s reference to manholes appears within a broader, non-exclusive description of the WL classification's scope; it does not purport to remove piping systems otherwise falling within the PB subclassification's plain terms simply because incidental access structures are also present in the same project. Nor does the "municipal or related water supply systems" exclusion in § 40-11-410(5)(f) assist Haren: the record reflects that the Project conveys non-potable seawater among a set of research maturation ponds located entirely on DNR's own hatchery property, for DNR's own mariculture operations — not any part of a municipal water utility system serving third-party customers.

II. Reply to SCDNR's Brief

A. *DNR's "Fact-Dependent" Framing Cannot Convert a Legal Question into One Committed to Agency Discretion.*

DNR's lead argument is that responsibility determinations, "including license limitations," require "project-specific facts and application of professional expertise," and are therefore "not purely questions of law." (DNR Br. at 12–13). This blurs a distinction that Paragon's and the CPO's Initial Briefs, and DNR's own cited authority, all recognize: the meaning of the statutory categories — what work falls within "Plumbing" as defined by § 40-11-410(5)(f) — is a question of law, reviewed de novo and without deference to the agency applying it, unless that agency administers the statute. How much of an undisputed set of project components falls into a correctly defined category can, in turn, involve a factual, percentage-based inquiry. DNR's own authority states the rule precisely: "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 Constr.*, 373 S.C. 475, 479–80, 646 S.E.2d 162, 164–65 (Ct. App. 2007)

(quoted at Haren Br. at 9). DNR cannot use the factual half of that sentence to swallow the legal half.

DNR's position that deference to its "selection" between WL and PB was nonetheless appropriate rests on the premise that DNR is charged with determining bidder responsibility, including "license limitations." (DNR Br. at 11–12, quoting OSE Manual § 6.11.2). Neither Paragon nor the CPO disputes that DNR must verify that a bidder holds a proper license before posting a notice of award. But the authority to verify that a bidder holds some qualifying license is not the same as authority to authoritatively construe a licensing statute's scope once that scope is genuinely disputed in a bid protest. The General Assembly assigned that interpretive role to the Contractor's Licensing Board in the first instance, S.C. Code Ann. § 40-11-10, and, once a protest is filed, to the CPO and the Panel on further review — not to the procuring agency whose own preference is at issue. *See Kiawah Dev. Partners II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) (deference is owed to "an administrative agency's interpretations with respect to the statutes entrusted to its administration")

DNR's reliance on § 11-35-3020(b)(i) does not close this gap. (DNR Br. at 14). That provision permits a governmental body to identify, in the invitation for bids, the license classification or subclassification it expects certain subcontractors to hold. It says nothing about a governmental body's authority to authoritatively construe the underlying licensing statute once a bid protest places that construction squarely in dispute — a role the Procurement Code assigns elsewhere, to the CPO and the Panel, applying ordinary tools of statutory construction without deference to the procuring agency's preferred outcome.

B. *DNR's "Rational Basis" Deference Cannot Substitute for an Answer to What § 40-11-410(5)(f) Means — And DNR Is Not the Agency Entitled to That Deference in Any Event.*

DNR defends the Panel's Order primarily by pointing to the absence of a competing engineering estimate below, framing this appeal as though it turns solely on which of two dueling cost percentages is more credible. (DNR Br. at 17–20). That framing assumes the answer to the antecedent legal question — what activities fall within the PB subclassification — is genuinely open or committed to agency choice. It is not. The statutory text expressly includes "the installation, alteration, and repair of all piping, fixtures, and appliances related to water supply, including pressure vessels and tanks," and "installation of a system of pipes, fittings, fixtures, drains, and all necessary component parts upon the premises ... to supply water ... and to convey sewage or other waste products." S.C. Code Ann. § 40-11-410(5)(f). The Project's yard piping and the piping and valves serving the maturation ponds are, without dispute, located solely within DNR's own property, are not situated on any public easement or right-of-way, and convey water to and from those ponds — precisely the activity the statute's plain text describes. Neither Respondent offers a competing textual reading that would exclude this work; both instead ask this Court to defer to DNR's contrary preference because it reflects "professional judgment" and "technical expertise." (DNR Br. at 13–14, 19–20; Haren Br. at 13). An engineer's judgment about how to allocate construction costs among trades cannot substitute for a legal determination of which statutory category a given scope of work falls into.

DNR separately cites *Jack's Custom Cycles* and *Be Mi* for the proposition that de novo review does not foreclose deference to an agency's interpretation of "its own" statutes and regulations. (DNR Br. at 16–17, citing *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); *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)). Both cases involved the Department of Revenue construing tax statutes that the Department itself administers. That is precisely the

distinction Paragon's and the CPO's Initial Briefs draw: deference of that kind is available only to "the agency charged with its administration." *Barton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 404 S.C. 395, 415, 745 S.E.2d 110, 121 (2013). DNR does not administer Title 40's contractor licensing provisions; the Contractors' Licensing Board does. S.C. Code Ann. § 40-11-10. Indeed, DNR's own brief acknowledges that the Board is "the state authority responsible for enforcing the provisions set forth in the Contractor's Licensing Act." *Protest of Roofco*, Panel Case Nos. 2000-14 and -14(II). DNR's own-agency deference authorities are accordingly inapposite here, where the interpreting agency and the administering agency are two different entities.

III. The Post-Award Remedy Question Does Not Provide an Independent Basis to Affirm.

Both Haren and DNR argue that even if Paragon and the CPO prevail on the licensing issue, the only available relief is a remand to SCDNR under Regulation 19-445.2015 and § 11-35-4310(3), rather than an award to Paragon or invalidation of Haren's contract. (Haren Br. at 21–23; DNR Br. at 22). Paragon does not concede this framing. The timing and legal effect of the contract's execution, and whether the pendency of the stay motion and this appeal affects the availability of pre-award relief, are squarely presented by DNR's own cross-appeal and are addressed at length in the Respondent's Briefs filed by Paragon and the CPO in response to that cross-appeal. Rather than duplicate that briefing here, Paragon and the CPO respectfully refer the Court to their Respondent's Briefs on the mootness and relief-availability issues, and note only that the remedy question bears on the scope of relief available if Appellants-Respondents prevail — it is not an independent ground for affirming the Panel's underlying interpretation and application of § 40-11-410(5)(f).

CONCLUSION

Neither Haren nor DNR identifies a plain-meaning reading of § 40-11-410(5)(f) that excludes the Project's yard piping and pond piping and valves from Paragon's Plumbing subclassification. Both instead ask this Court to defer to DNR's contrary licensing preference, notwithstanding that DNR does not administer this statute, that the Panel's own order disclaimed any role in construing it, and that the CPO — applying the identical text to the identical record — reached the opposite conclusion. For these reasons, and for the reasons stated in the Initial Briefs of Paragon and the CPO, the Panel's March 13, 2026, Order and April 6, 2026, Order Denying Motions to Reconsider should be reversed, and the CPO's November 19, 2025 Decision should be reinstated.

Respectfully submitted,

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