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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.

RESPONDENT HAREN CONSTRUCTION CO., INC'S REPLY IN SUPPORT OF ITS PETITION FOR REVIEW OF THE COURT'S ORDER DATED MAY 20, 2026 GRANTING APPELLANT PARAGON, INC. OF SOUTH CAROLINA, LLC'S MOTION TO STAY

Respondent Haren Construction Co., Inc. ("**Haren**") respectfully submits this Reply in Support of its Petition for Review of this Court's Order dated May 20, 2026 granting Appellant Paragon Inc. of South Carolina, LLC's ("**Paragon**") Motion to Stay.

SUMMARY OF THE ARGUMENT

Paragon does not dispute that the contract was awarded no later than May 4, 2026, but instead asks the Court to ignore the express terms of the Procurement Code, which forecloses the

re-procurement remedy it seeks to preserve through a stay. Its arguments amount to dissatisfaction with the remedial framework imposed by statute and do not warrant a stay.

The Procurement Code does not distinguish between pre-construction and post-construction relief; it distinguishes between pre-award and post-award relief. The Procurement Code's post-award remedial framework—termination or ratification under § 11-35-4310(3)(b) and bid preparation costs under § 11-35-4310(4)—reflects a deliberate legislative choice to limit disruption to awarded contracts. Paragon's argument effectively asks the Court to disregard the legislature's chosen remedial scheme in favor of an equitable remedy, but equity cannot displace an adequate remedy at law.

Paragon argues that once construction is complete, there will be "nothing left to terminate." But the statute authorizes ratification or termination of a contract awarded in violation of the law without regard to how much work has been performed. Paragon cites no authority for the proposition that partial or even substantial construction performance extinguishes those remedies as a matter of law. And if this appeal will be fully briefed and argued as swiftly as Paragon claims, then the termination remedy will remain practically available when this Court issues its decision. Paragon has presented no evidence that construction will be completed before then, and a stay is not warranted based on a worst-case timeline that Paragon has not established.

The legislature has defined the remedies available to disappointed bidders after a contract has been awarded. If this Court determines that the award to Haren violated the law, then the Panel on remand may either ratify or terminate the contract. *See* S.C. Code Ann. § 11-35-4310(3)(b). That is the full scope of available relief. Rescission and re-procurement are not authorized at this stage, and the fact that § 11-35-4310(3)(b) permits termination as a remedy does not require the Court to stay this matter to preserve jurisdiction or prevent a contested issue from becoming moot.

A stay is not necessary to preserve the remedies under § 11-35-4310(3)(b), and the Court should lift it.[1]

ARGUMENT

I. A STAY IS UNNECESSARY BECAUSE THE PROCUREMENT CODE PROVIDES AN ADEQUATE LEGAL REMEDY AND FORECLOSES THE RELIEF SOUGHT BY PARAGON.

Paragon confoundingly argues that if the award to Haren was, indeed, in violation of the law, which Paragon has not yet proved, that "the Procurement Code and this Court's equitable authority authorize recission of the unlawfully awarded contract and re-procurement." Neither premise holds.

In crafting § 11-35-4310, the legislature balanced the competing interests—a disappointed bidder's claim against the public's interest in stable contract performance—and resolved them in favor of a monetary remedy. *See In re Protest of Gregory Electric Co.*, Panel Case No. 1989-17(III), 1990 WL 10008052, at *1–2 (S.C. Procure. Rev. Panel Jan. 26, 1990) ("[I]njunctive relief is not the appropriate remedy for a disappointed bidder when public interest considerations are present and when a claim for damages is available, even if the bidder is limited to recovery of bid preparation costs."). Rescission and re-procurement are not authorized at this stage, and Paragon's invocation of the Court's "equitable authority" cannot expand the remedies allowed by statute. *See Key Corp. Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 61, 644 S.E.2d 675, 678 (2007) ("While equitable relief is generally available where there is no adequate remedy at law, an adequate legal remedy may be provided by statute.").

[1] Rule 241(d)(2) and Rule 7, SCACR, do not require a party to identify legal error. Rather, they permit a party aggrieved by an individual Judge's ruling to seek review by the full Court. In its Petition for Review, Haren respectfully submitted that the Court may have overlooked or misunderstood the contract's award date and the resulting limits the Procurement Code places on available remedies.

Paragon's real complaint is not that termination would be legally unavailable after construction proceeds, but rather that termination at that stage would be less desirable. But Paragon's preference does not displace the remedies imposed by statute or alter the conclusion that a stay is unnecessary to preserve the availability of those remedies. And if the appeal will be fully briefed and argued as swiftly as Paragon claims, then the termination remedy remains practically available without a stay.

Paragon's position, taken to its conclusion, would justify a stay in virtually every public construction appeal. There will always be a future point at which a contract is fully performed and termination is no longer possible. If that theoretical possibility were sufficient to establish the necessity of a stay, then every disappointed bidder would hold a procedural tool to delay public projects indefinitely simply by filing an appeal. The Panel has rejected that result and recognized that the legislature's chosen post-award remedies are sufficient to protect the disappointed bidder's interest. *See In re Protest of Gregory Electric Co.*, 1990 WL 10008052 at *1–2 ("It would be intolerable for any frustrated bidder to render uncertain for a prolonged period of time government contracts which are vital to the functions performed by the sovereign." (quoting *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1303 (D.C. Cir. 1971) (internal quotation marks omitted))).

Paragon's reliance on S.C. Code Reg. 19-445.2085(C) is equally unavailing. That regulation applies only when the CPO makes a written determination that one of eight enumerated criteria exist warranting cancellation of an award. *See* S.C. Code Reg. 19-445.2085(C)(1)–(8). No such written determination was made here. The regulation provides no support for the stay Paragon seeks.

Finally, Paragon's "race to execution" concern is both speculative and incomplete. It ignores that this matter was automatically stayed throughout the administrative review process.

See S.C. Code Ann. § 11-35-4210(7). The legislature's decision to impose an automatic stay during administrative review, while expressly providing in § 11-35-4410(6) that an appeal to the Court of Appeals does not stay the Panel's final decision, reflects a deliberate policy choice. Additional delay beyond the Panel's decision is unwarranted absent extraordinary circumstances. That statutory structure expresses the General Assembly's confidence in the Panel's expertise and its judgment that public projects should not be held hostage pending an appeal.[2]

II. EQUITY DOES NOT ENTITLE PARAGON TO A STAY.

A motion to stay is not a temporary restraining order. Paragon sought a stay before this Panel and was denied. SCDNR had no legal obligation to halt contract execution merely because Paragon filed a motion, and acting within one's legal rights during a pending motion cannot constitute inequitable conduct.

Even if equity could supplant the remedies available at law, the equities favor Haren, not Paragon. Haren incurred significant costs to purchase the bonds required under the contract in reasonable reliance on: the expiration of the automatic stay under § 11-35-4210(7); the Panel's denial of Paragon's motion for reconsideration on April 6; the expiration of the stay imposed by the Panel's Procedural Order dated March 25; and the Panel's denial of Paragon's motion to stay on April 14. That reliance was further justified by the remedial framework of § 11-35-4310, which limits post-award remedies once the parties have begun or are preparing to perform to minimize delay and disruption in public projects.

[2] As our Supreme Court has observed, the Panel's expertise in procurement matters arguably exceeds that of generalist courts. *See Unisys Corp. v. S.C. Budget & Control Bd., Div. of Gen. Servs., Info. Tech. Mgmt. Off.*, 346 S.C. 158, 174, 551 S.E.2d 263, 272 (2001) ("As far as expertise, we question whether a circuit court judge would have any more expertise in the area of procurement contracts.").

Moreover, even if Paragon establishes that the award was unlawful, the termination remedy under § 11-35-4310(3)(b) expressly provides for payment of damages to Haren. A stay does not and fails to adequately protect Haren, particularly where Paragon has not posted a bond or any other form of security. *See* Rule 241(c)(3), SCACR.

III. PARAGON FAILED TO ESTABLISH THE ELEMENTS FOR AN INJUNCTION BEFORE THE PANEL AND FAILS TO DO SO NOW.

As the Panel has repeatedly recognized, "[a] request for a stay pursuant to § 1-23-380(c)[3] is the same as a request for a temporary injunction." *In re Protest of Gregory Electric Co.*, 1990 WL 10008052, at *1 (citing *Parker v. S.C. Dairy Comm'n*, 274 S.C. 209, 262 S.E.2d 38 (1980)). The burden of establishing entitlement to this extraordinary relief rests squarely with Paragon. *See In re Protest of Royal Bus. Machines*, Panel Case No. 1984-7C(II), 1984 WL 563609, at *2 (S.C. Procure. Rev. Panel Nov. 15, 1984) (citing *Moss v. S.C. State Highway Dep't*, 223 S.C. 282, 75 S.E.2d 462 (1953)). Accordingly, Paragon must show (1) that it has no adequate remedy at law, (2) that it is likely to succeed on the merits, and (3) that the conduct sought to be restrained will cause irreparable harm. *Id.* (citing *Greenwood Cnty. v. Shay*, 202 S.C. 16, 23 S.E.2d 825 (1943)). In administrative cases such as this, it is also appropriate to consider the effect of the requested stay on the public interest. *Id.* (citing *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1303 (D.D.C. 1971)). Paragon failed to make that showing before the Panel and again fails to do so on appeal.[4]

[3] The applicable language is now found in section 1-23-380(2) and expressly references S.C. R. Civ. P. 65.

[4] Haren hereby incorporates by reference its arguments regarding the elements for injunctive relief set forth in its Return in Opposition to Paragon's Motion to Stay filed April 28, 2026.

A. Paragon has an adequate remedy at law.

Paragon entirely failed to establish that it lacked an adequate remedy at law. As the Panel has repeatedly recognized, "injunctive relief is not the appropriate remedy for a disappointed bidder when public interest considerations are present and when a claim for damages is available, even if the bidder is limited to recovery of bid preparation costs." *In re Protest of Gregory Electric Co.*, Panel Case No. 1997-17(III) (collecting cases). Here, Paragon plainly has an adequate remedy at law, notwithstanding its dissatisfaction with that remedy. S.C. Code Ann. § 11-35-4310(4) expressly authorizes an award of "a reasonable reimbursement amount, including reimbursement of reasonable bid preparation costs" to a bidder who claims it should have been awarded the contract. *Id.* Because an adequate legal remedy is available, a stay or injunctive relief is not warranted. *See In re Protest of Gregory Electric Co.*, Panel Case No. 1997-17(III).

B. Paragon has not established a likelihood of success on the merits.

The Panel independently interpreted § 40-11-410(5)(f) and concluded that PB was at most a permissible classification for some Project work, not a required one, expressly stating that its Order "does not determine that WL licensure was the only possible classification for the Project." The Panel deferred only to SCDNR's technical judgment regarding how the Project's complex piping network, pumping components, manholes, and utility structures fit within the license categories—not to SCDNR's legal interpretation of the statute—and concluded that WL was likewise a permissible classification.

Faced with two potentially permissible classifications, the Panel looked to the ***only*** record evidence allocating Project work between them: the engineer of record's Design Cost Estimate, which attributed 80% of the Project work to the WL classification. Paragon bore the burden of proving that at least 51% of the Project fell within the PB subclassification, yet submitted no

engineering or technical analysis to substantiate its percentage allocations and failed to present such evidence at the appropriate stage of the proceedings—rendering any challenge to the Design Cost Estimate unpreserved and untimely. Because Paragon failed to demonstrate that SCDNR's responsibility determination was clearly erroneous, arbitrary, capricious, or contrary to law under § 11-35-2410(A), it cannot demonstrate a likelihood of success on appeal.

C. <u>Paragon cannot establish irreparable harm</u>.

Because Paragon has an adequate remedy at law—termination or ratification under § 11-35-4310(3)(b) and bid preparation costs under § 11-35-4310(4)—it cannot establish irreparable harm. *See In re Protest by Royal Business Machines*, 1984 WL 563609, at *3 ("Nor have petitioners made a prima facie showing of irreparable harm. Any alleged harm that might be suffered by petitioners if a stay is not granted would be monetary, and is the same as the harm that [respondent] would suffer if a stay were granted."). Paragon cites no authority for the proposition that partial or even substantial construction performance extinguishes those remedies as a matter of law.

The concrete harm to Haren, SCDNR, and the public is *not* speculative.[5] Haren holds a lawfully executed contract and has committed significant resources to performance, including the significant costs of purchasing the bonds required under the contract. SCDNR operates a facility requiring maintenance that the stay continues to delay. An accelerated briefing schedule is welcome, but "bounded" delay is still real delay. The public, not Paragon, bears that cost. *See In re Protest of Gregory Electric Co.*, 1990 WL 10008052, at *2 ("[T]he public has a strong interest in having procurements of vital goods and services by the State proceed without disruption and

[5] *See Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 587, 694 S.E.2d 15, 17 (2010) ("[T]he balancing requirement is subsumed by the irreparable harm and inadequate remedy at law components of the three-part test.").

delay."). If Paragon succeeds on appeal, the public interest in lawful procurement can be fully vindicated through the remedies available under § 11-35-4310(3) and (4) without halting contract performance. *See id.*

The public interest weighs further against a stay. The Project is directly connected to sensitive saltwater marsh and wetland systems, and research performed at the WMC is directed toward the culture and practical production of aquatic species of economic importance to the state.[6] Our Supreme Court has described South Carolina's tidelands as a "precious public resource." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 22, 766 S.E.2d 707, 710 (2014). Ensuring that this work is performed by a properly qualified and licensed contractor in a sensitive wetlands environment is itself a matter of public interest and cuts against, not in favor of, disrupting the award to a contractor whose qualifications the Panel has already upheld.

CONCLUSION

For the reasons set forth above, Haren respectfully requests that the Court lift the stay in this matter.

[6] *Located on the Colleton River, Beaufort County, SC*, DNR.SC.GOV, https://www.dnr.sc.gov/marine/mrri/waddell/index.html (last visited Jan. 12, 2025). The WMC also produces large numbers of red drum juveniles, as well as other finish species, for stock enhancement and fishery management projects. *Research - Finfish*, DNR.SC.GOV, https://www.dnr.sc.gov/marine/mrri/waddell/finfish.html, (last visited Jan. 12, 2025).

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that on June 10, 2026, a copy of **Respondent Haren Construction Co., Inc's Reply in Support of its Petition for Review of the Court's Order Dated May 20, 2026 Granting Appellant Paragon, Inc. of South Carolina, LLC's Motion to Stay** was served on all counsel of record via email to counsels' individual AIS email addresses:

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