

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2017-000134

Lower Court Case No. 2016-CP-40-07353

Richardson Construction Company, Inc. ....Appellant,

v.

Richland County, a political subdivision, and  
McClam & Associates, Inc., ..... Respondents.

**MEMORANDUM IN OPPOSITION TO APPELLANT'S MOTION FOR EXPEDITED  
TEMPORARY INJUNCTION PENDING APPEAL**

Respondent Richland County ("County"), by its undersigned attorneys, submit this Memorandum in Opposition to the Motion of the Appellant, Richardson Construction Co., Inc. ("RCC" or "Richardson") for Expedited Temporary Injunction Pending Appeal<sup>1</sup> as follows:

**I. INTRODUCTORY FACTS AND PROCEDURAL POSTURE**

This matter arises out of a procurement protest by the Appellant after it was declared non-responsive by Richland County for the award of a road extension contract for a project known as

<sup>1</sup> The County notes that it has filed a Motion to Dismiss Appellant's Appeal contemporaneously with the filing of this Memorandum. Should the Court dismiss the Appeal, then Appellant's Motion for Temporary Injunction before this Court would be moot.

the Shop Road Extension Phase I (“the Shop Road Project.”) The Appellant is a disappointed non-responsive bidder that had its bid disqualified by the County. The Appellant, attempting to bypass the County’s Procurement Ordinance, filed this lawsuit in part seeking a temporary injunction to prohibit the County from executing a contract (“the Shop Road Contract”) with the sole responsive bidder on the Shop Road Project, co-Respondent McClam & Associates, Inc. (“McClam). The Appellant then filed a Motion for Temporary Injunction on December 19, 2016 seeking only to enjoin the award of the Shop Road Contract. (See Respondent Richland County’s Record in Support of Motion to Dismiss and In Opposition to Appellant’s Motion for Temporary Injunction – hereinafter referred to as “Respondent’s Record,” pp. 1-7.)

The Honorable DeAndrea G. Benjamin by Order filed December 22, 2016, denied the Motion. (See “Documents Supporting Appellant’s Motion for Temporary Injunction Pending Appeal,” hereinafter referred to as “Appellant’s Record,” pp. RCC 174-183). Judge Benjamin ruled in her Order against the Appellant on nearly every ground available<sup>2</sup>, including:

1. That the Appellant did not show a likelihood of success on the merits since the Appellant admitted that its bid listed the wrong subcontractor that was not qualified by the County as an SLBE and the County did not have to waive this bid mistake. (Appellant’s Record, pp. RCC 177-179).
2. That the decision by the County not to waive Appellant’s bid error was reasonable. (Appellant’s Record, p. RCC 179).
3. That Appellant had an adequate remedy at law because even if the Appellant was permanently denied the Shop Road Contract, it ultimately, if correct, could be awarded its bid preparation costs by the Richland County Procurement Review Panel. (Appellant’s Record, pp. 179-182).
4. That Appellant could not overcome the County’s “compelling argument” that a delay in the Shop Road Project by the enjoining of the award of the Shop Road Project Contract would be extremely prejudicial to the County. (Appellant’s Record, pp. 182-183).

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<sup>2</sup> While Judge Benjamin’s Order may not be binding on this Court for purposes of the pending Motion, the County submits that her findings are persuasive.

The Appellant on January 23, 2017 filed its Notice of Intent to Appeal the Order. Prior to the appeal, the Appellant filed an Amended Complaint on January 19, 2017. The Amended Complaint contained allegations that (1) there was not a Procurement Director at Richland County (Appellant's Record, pp. RCC 293-311, Amended Complaint, ¶¶66-67, and ¶¶128-129), and (2) there was not a properly constituted Richland County Procurement Review Panel (Id., Amended Complaint, ¶¶64-65, 109-121; 126, and 130).

Matters with respect to the non-temporary injunction cause of action have proceeded in the Circuit Court, with most recently Judge Toal indicating at a hearing on the County's Motion to Dismiss that she would deny that motion.<sup>3</sup> (See Appellant's Record, pp. RCC 523-526.)

However, notwithstanding proceedings in the Circuit Court, the Appellant took no further action in this Court, even seeking and obtaining an extension on March 7, 2017 from this Court to file its Initial Brief and Designation of Matter to be Included in the Record on Appeal. Thus, the Appellant could have, but did not, choose to immediately seek relief in this Court from Judge Benjamin's Order in any further attempt to prevent the County and McClam from executing the Shop Road Contract. Further, the Appellant could have, and did not, file a Motion seeking to suspend performance of McClam for the Shop Road Contract from December 22, 2016 until May 9, 2017, nearly a half-year after being denied relief by Judge Benjamin. This is significant given that the Appellant, through its own inaction, allowed the County and McClam to enter into the Shop Road Contract and begin construction of the Shop Road Project, before Appellant filed this Motion.

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<sup>3</sup> After the Notice of Appeal was filed, Judge Benjamin ruled on two Rule 59 motions filed by Appellant. While not germane to the issues in the Motion, the County does not believe Judge Benjamin had jurisdiction to decide those motions after the Notice of Appeal of her Order was filed.

The sole remedy sought by the Motion for Temporary Injunction<sup>4</sup> as stated in the Motion was “[p]ursuant to Rule 65, SCRPC, RCC requests that this Court issue a temporary injunction staying execution of the Shop Road Project contract until the Richland County Procurement Review Panel (sometimes referred to herein as “the Panel”) can hear and decide RCC’s pending appeal and award protest.” The Appellant reinforced that in its Initial Brief:

RCC filed this lawsuit on December 15, 2016, requesting a temporary restraining order and temporary injunction to postpone execution of a contract with McClam until the Procurement Review Panel could hear RCC’s appeal and protest and a writ of mandamus directing Richland County to constitute a Procurement Review Panel.

(Appellant’s Initial Brief, p. 6). There was no other issue before Judge Benjamin than the Appellant’s Motion seeking a Temporary Injunction to enjoin the execution of the Shop Road Contract. Thus, the sole issue before *this Court* concerns a motion that sought an Order to enjoin the award of a contract and the lower court’s denial of that motion. Significantly, the Appellant never renewed its Motion before this Court.

After the denial by Judge Benjamin of Appellant’s Motion for Temporary Injunction on December 22, 2016, the County and McClam, as planned, executed the contract for McClam to commence work on the Shop Road Extension Project on January 11, 2017. (Respondent’s Record, p. 102; Second Affidavit of Rob Perry, ¶5). McClam has been at work on this project since February 13, 2017. (Respondent’s Record, pp. 102-103, Second Perry Affidavit, ¶6). The project

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<sup>4</sup> The Complaint itself and then the Amended Complaint sought slightly broader relief. As alleged in the Amended Complaint at ¶¶100-107, Appellant sought either to enjoin the execution of the Shop Road Contract between the County and McClam (¶106) or if the contract was awarded, “to suspend the contract and direct McClam to conduct no work on the contract until such time as the Richland County Procurement Review Panel an hear and decide” the Appellant’s protests. (¶107). (Appellant’s Record, pp. RCC-017-018). Neither the first Motion for Temporary Injunction nor the Order denying that Motion discussed the alternative form of relief of suspending the award of the Shop Road Contract if awarded. Thus, the alternative form of relief in ¶107 has first been raised by Appellant’s Motion for Expedited Temporary Injunction Pending Appeal filed on May 9, 2017, even though the same claim existed beginning with its Compliant filed in December 2016.

is between approximately 15.5% to 16.5% complete and the County has paid McClam \$3,428,604.95 of the total contract value of \$24,539,282.95 for work completed by McClam on the project. (Respondent's Record, pp. 102-103; Second Perry Affidavit, ¶6).

Additionally, Appellant's claim in its Motion (p. 7) that there is no Richland County Procurement Director (and therefore there is no person to determine Appellant's initial protest under the Richland County Ordinance) is not correct. The County has appointed Jennifer Wladischkin as Assistant Procurement Director/Manager and Acting Procurement Director/Manager who will provide the initial determination of the Appellant's protest. (See May 12, 2017 Wladischkin letter to Richardson legal counsel, Respondent's Record, pp 205-206.)<sup>5</sup> Wladischkin will make her decision on Appellant's protest within ten (10) days of her subsequent letter of May 18, 2017. (See Wladischkin Affidavit, ¶7, Ex. G; Respondent's Record, pp. 196, 214-215).

Appellant filed its Motion for Expedited Temporary Injunction Pending Appeal on May 11, 2017. That motion presumably arises out of the alternative relief request at ¶105 of the Complaint to suspend the work under the Shop Road Contract.

## **II. UNDISPUTED FACTS.**

The County believes that the Appellant has filed this Motion in the wrong Court and that this Court should not hear the Motion, as outlined *infra*. However, the County must also address the merits of the Motion, and therefore does so in the below facts that the County presented to Judge Benjamin that led to her Order.

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<sup>5</sup> Appellant filed its Supplement to its Motion on May 17, 2017 apparently disputing the legitimacy of the appointment of Ms. Wladischkin as Acting Procurement Director. As stated in Section IV. E. 3, *infra*, this argument is frivolous, scandalous, and without any legal support.

The Appellant seeks a temporary injunction prohibiting the County from executing a \$24,000,000 road construction contract with the responsive bidder selected by Richland County Council for the extension of Shop Road, a project with a tight timeline and of great economic importance to the citizens of Richland County as explained *infra*. The Appellant's relief sought, however, is based on a misreading of the Richland County Procurement Code and is not legally permissible under well-established procurement law principles.

Appellant's Verified Complaint and the affidavits submitted herewith provide the following undisputed facts:

- The Appellant was one of three bidders to Richland County on Phase I of the Shop Road Extension construction project ("Shop Road Project.") (Complaint, ¶¶6 & 11) (Appellant's Record, pp. RCC 005-21).
- The Invitation for Bids for the Shop Road Project contained, among others, the following instructions:
  - "The SLBE goal for this Project is 4.37%. Accordingly, the Contractor will complete the SLBE Participation Sheet included in this document and accompany it with his Application for Payment Each month." (p. 6)
  - "INSTRUCTIONS TO BIDDERS. ... 7. CORRECTION OF ERRORS ON THE BID FORM: .... No bid shall be altered or amended after specified time for opening." (p. 8)
  - "SMALL LOCAL BUSINESS ENTERPRISE (SLBE) PARTICIPATION SHEET...BIDDER is required to complete the SLBE Identification Forms and submit it with the Proposal. Any SLBE company identified must be certified in accordance with the certification program of the Richland County Government."

(Appellant's Record, pp. RCC 232-292; Affidavit of Christy Swofford, ¶7, Ex. A.)

- The other two bidders besides Appellant were C.R. Jackson, Inc. and McClam & Associates, Inc. (Complaint, ¶11).
- In the Shop Road Project bid package, Richland County's goal for bidder was that that Disadvantaged Business Enterprise ("DBE") participation be Seven (7%) Percent of the amount of the bid and Small Local Business Enterprise ("SLBE") participation be Four (4.37%) and Three Seven Hundredth Percent. (Complaint, ¶14).

- The PDT, a contractor hired by the County to manage parts of the procurement of Penny Sales Tax roadway construction projects, recommended that bidder C.R. Jackson, Inc. be awarded the Shop Road Project. (Complaint, ¶¶19-20; 34).
- However, the County disagreed with the PDT's recommendation that C.R. Jackson, Inc. be awarded the Shop Road Project and the County Procurement Office, County Transportation Director, and County Administrator recommended to County Council that the Shop Road Project be awarded to McClam and Associates. (Complaint, ¶41, Exhibit 3).
- The County determined that C.R. Jackson, Inc.'s bid was no-responsive. (Complaint, ¶41, Exhibit 3).
- C.R. Jackson has not protested the County's determination, and therefore any action taken by the PDT or by the County with respect to C.R. Jackson, Inc. has no bearing on this matter.
- The Appellant in its bid "inadvertently" submitted as its SLBE subcontractor LAD, Inc., which was not a certified SLBE contractor. (Complaint, ¶¶23-25).
- Appellant admits in its legal counsel's letter of October 31, 2016 what it did wrong: "After the bid opening, the PDT informed Richardson that LAD, Inc. was not on the SLBE certified directory. Richardson then realized it had inadvertently submitted an earlier internal draft of the SLBE with LAD, Inc.'s name and address for a different subcontractor...." (Complaint, ¶41, Page 2 of Exhibit 1 [10/31/16 Letter] to Exhibit 4)
- Notwithstanding its post-bid opening explanation, the Appellant in its bid swore under oath that LAD, Inc. was its SLBE. (Appellant's Record, pp. RCC 232-292; Affidavit of Christy Swofford, ¶4, Ex. B.)
- Thus, the Appellant's bid was deemed non-responsive by the County because it failed to list a certified SLBE at bid opening. (Complaint, ¶41, Exhibit 3);<sup>6</sup> (Appellant's Record, pp. RCC 232-292; Affidavit of Christy Swofford, ¶¶8-12.)
- Appellant appeared before the Richland County Council at its meeting on December 6, 2016 and argued the merits of awarding the contract to Appellant. (Complaint, ¶47).

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<sup>6</sup> The Complaint makes several factual allegations unsupported by Exhibit 3, the Memorandum of County Administrator Gerald Seals to Richland County Council. The Complaint claims that Mr. Seals made unilateral policy determinations that the Appellant's bid was nonresponsive. (Complaint, ¶¶42-44). However, as paragraph 3 of Mr. Seals Council Memorandum 11-3 attached as Exhibit 3 to the Complaint states, "Therefore, the County Transportation Director, the County Procurement Office, and I are in agreement that the Richardson bid is non-responsive under the County Procurement Ordinance and County SLBE Ordinance." (*Emphasis added.*) Thus, there was not some individual policy mandate by the County Administrator, all three interested County offices, including Procurement, agreed that the Richardson bid was non-responsive. Most importantly, Mr. Seals' memorandum was a joint recommendation to the County Council as to whom to award the contract. It was not a "policy determination" as to how such matters would be judged in the future.

- Richland County Council at its December 6, 2016 meeting voted 9-2 to award the Shop Road Project to co-defendant McClam & Associates, Inc. (Complaint, ¶48).
- The McClam bid for the Shop Road Project accepted by the County was for \$24,539,282.95. (Complaint, ¶11.)
- The McClam bid met all of the bid requirements and was responsive to the bid solicitation. (Complaint, Exhibit 3 (Council Memo 11-3), p. 86)

There are a number of sections of the Richland County Procurement Ordinance applicable here. Richland County's Procurement Ordinance is codified at Richland County Ordinances, Chapter 2, Article X, Division 2. The Procurement Ordinance is a proper exercise of the County's home rule authority. Glasscock Co. v. Sumter County, 361 S.C. 483, 604 S.E.2d 718 (Ct. App. 2004).

RC Ord. Section 2-593 entitled "Contract Authority" provides in pertinent part that "[p]urchases in excess of thirty thousand dollars (\$30,000.00) shall be reviewed and approved by the county council prior to acceptance..." and "[p]rovided, however that the county administrator shall have the authority to approve contracts in any amount up to and including one hundred thousand dollars (\$100,000.00) when said contract is for a road-related construction project." Thus, while the Administrator can recommend any contract for road construction over \$100,000, the actual contract has to be approved by County Council, as was the Shop Road Contract.

RC Ord. Section 2-608 applies to projects that are bid: "[w]hen this procedure is utilized and the estimated cost exceeds fifteen thousand dollars (\$15,000.00), an award based upon an invitation to bid shall be made according to prescribed procedures from the lowest responsive and responsible vendor after due notice inviting bids." Pertinent subsections of RC Ord. 2-608 are:

(b) *Submission of bids.* All bids shall be on an official bid form provided by the office of procurement and shall be sealed and mailed or otherwise delivered to the director of procurement by the time specified in the invitation to bid. Late bids shall not be considered unless the delay was caused by improper handling by county employees. All bids shall be accompanied by a statement of noncollusion from the vendor.

....

(e) *Award of contract.* Subject to any exceptions found elsewhere in this article, all contracts shall be awarded to the lowest responsive and responsible vendor whose bid complies materially with the specifications publicized. The director of procurement may, however, refuse all bids and readvertise for bids, if the public interest would be served thereby; provided, however, that, if the director of procurement shall refuse all bids, he shall submit to the county administrator a written explanation of the reasons therefor.

(Emphasis added.)

The Richland County Ordinance also provides for certain types of appeals in procurement matters as well. Section 2-621.1, entitled “Authority to resolve protested solicitations and awards,” provides as follows:

(a) *Right to protest.* Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation or award of a contract may protest to the director of the office of procurement. The protest, setting forth the grievance, shall be submitted in writing within ten (10) days after such aggrieved person knows or should have known of the facts giving rise thereto. No protest shall be considered if filed more than thirty (30) days after award of a contract. A vendor/contractor who initiates a protest may be required to reimburse the county for its legal and administrative costs if the procurement review panel determined that the protest was frivolous or without merit.

.....

(c) *Administrative decision.* If settlement of a protest shall not be accomplished within a reasonable time, the director of the office of procurement shall issue a written decision within ten (10) days following the determination that settlement is not possible. The decision shall state the reasons for the action taken.

(d) *Notice of decision.* A copy of the decision under subsection (c) of this section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.

(e) *Appeal to Richland County procurement review panel.* A decision under subsection (c) of this section shall be final and conclusive, unless within ten (10) days following its issuance, the person aggrieved thereby shall file written appeal to Richland County procurement review panel, setting forth the grounds for same. The protestant may also request an interview with the panel. Appeal to the procurement review panel shall not stay issuance or execution of a contract.

(f) *Review.* No later than thirty (30) days from receipt of an appeal, the review panel shall consider and determine the matter and shall file its written decision,

including findings of fact and conclusions of law. Upon a finding that the appeal is meritorious, the review panel may direct an award of contract to the protestant, may require that a contract be re-bid, and [sic] may award reimbursement to the protestant of reasonable bid preparation costs.

(g) *Judicial review.* The review panel decision shall constitute final administrative review and exhaustion of administrative remedies for purposes of judicial review in "contested cases" as defined by the South Carolina Administrative Procedures Act, section 1-23-380 S.C. Code of Laws (1976).

(Emphasis added.)

Richland County Ordinance Section 2-621.4 calls for the creation of the Procurement Review

Panel:

(a) *Creation.* There is hereby created the Richland County procurement review panel (review panel) which shall be charged with the responsibility of providing an administrative review of formal protests of decisions arising from the solicitation and award of contracts, the debarment or suspension of a person from the consideration for award of a contract, a decision concerning the resolution of a contract or breach of contract controversy, or any other decision, policy or procedure arising from or concerning the expenditure of county funds for the procurement of any supplies, services, or construction procured in accordance with the provisions of this code and regulations.

(b) *Membership.* The panel shall be composed of five (5) members selected by the county council:

- (1) One (1) member serving in a public procurement arena, preferably at management level with state or local government;
- (2) One (1) member representing the service industry;
- (3) One (1) member from the construction industry;
- (4) One (1) member from professional services;
- (5) One (1) member from the consumer industry.

(c) *Chairperson and meetings.* The panel shall elect a chairperson from among its members and shall meet as often as necessary to afford a swift resolution of the controversies submitted to it. Three (3) members present and voting shall constitute a quorum. Members of the panel shall be paid per diem, mileage, and subsistence as provided by law for members of boards, commissions, and committees to be paid from funds appropriated to the county administrator.

(d) *Administrative support.* The county administrator shall provide such administrative and clerical support as necessary for the orderly transaction of business by the review panel.

(Emphasis added.)

Another pertinent section of the Richland County Ordinances is the Small Local Business Enterprise (“SLBE”) Ordinance at Chapter 2, Article XI, Division 7. RC Ord. 2-639 *et seq.* As noted in Section 2-639(a):

*Purpose.* The purpose of this division is to provide a race- and gender-neutral procurement tool for the county to use in its efforts to ensure that all segments of its local business community have a reasonable and significant opportunity to participate in county contracts for construction, architectural and engineering services, professional services, non-professional services, and commodities. The small local business enterprise (“SLBE”) Program also furthers the county's public interest to foster effective broad-based competition from all segments of the vendor community, including, but not limited to, minority business enterprises, small business enterprises, and local business enterprises. This policy is, in part, intended to further the county's compelling interest in ensuring that it is neither an active nor passive participant in private sector marketplace discrimination, and in promoting equal opportunity for all segments of the contracting community to participate in county contracts. Moreover, the SLBE program provides additional avenues for the development of new capacity and new sources of competition for county contracts from the growing pool of small and locally based businesses.

RC Ord. Section 2-644 entitled “Affirmative procurement initiatives for enhancing SLBE and emerging SLBE contract participation,” provides at Subsection (a): “The county in conjunction with the appropriate contract officer and the director of procurement may utilize the following affirmative procurement initiatives in promoting the award of county contracts to SLBEs or emerging SLBEs.” Thereafter, RC Ord. 2-644(a) at sub-subsection (4) provides for the mandatory SLBE subcontracting requirements.

(4) *Mandatory subcontracting.*

a. The goal selection committee may, on a contract-by-contract basis, at its discretion, require that a predetermined percentage of a specific contract, up to forty percent (40%), be subcontracted to eligible SLBEs or to eligible emerging SLBEs, provided however, that if the prime contractor is a certified SLBE or emerging SLBE, then the prime contractor shall be able to count the dollar value of the work performed by its own forces towards satisfaction of the mandatory subcontracting goal for that contract.

....

c. A prospective bidder on a county contract shall submit at the time of bid SLBE - Form S providing the name of the SLBE or emerging SLBE subcontractor or subcontractors and describing both the percentage of subcontracting by the SLBE or emerging SLBE, and the work to be performed by the SLBE or emerging SLBE. A bidder may request a full or partial waiver of this mandatory subcontracting requirement from the director of procurement for good cause by submitting the SLBE unavailability certification form to the director of procurement at the time of bid. ....

....

d. In the absence of a waiver granted by the director of procurement, failure of a prime contractor to commit in its bid or proposal to satisfying the mandatory SLBE subcontracting goal shall render its bid or proposal non-responsive.

(Emphasis added.) The determination that the Appellant's bid was non-responsive, the consequences of that determination, and the Appellant's remedy are provided in the above Ordinances and the Shop Road Project Invitation to Bid.

**III. THE APPELLANT IMPROPERLY FILED THIS MOTION BEFORE THIS COURT; THE MOTION SHOULD HAVE BEEN FIRST FILED BEFORE THE CIRCUIT COURT.**

South Carolina Rules of Civil Procedure Rule 62 provides in pertinent part:

**(c) Injunction Pending Appeal.** When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

**(d) Stay Upon Appeal.** When an appeal is taken, a party, by giving a supersedeas bond, may obtain a stay subject to the exceptions contained in subdivision (a) of this rule and the South Carolina Appellate Court Rules. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the supersedeas as the case may be. The stay is effective when the supersedeas bond is approved by the court.

....

**(g) Power of Appellate Court Not Limited.** The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment

subsequently to be entered. An application for such relief should first be made to the trial court under Rule 62(c) or (d), but when such application is not practicable it may first be made to an appellate court or a judge or justice thereof.

(Emphasis added.)

Appellant filed the Motion pursuant to Rule 62(g), SCRCF alleging that it was not practicable to seek injunctive relief initially before the Circuit Court. SCRCF Rule 62(g) expressly requires the Appellant to file first in the Circuit Court. Appellant did not do so, arguing “application to the trial court first is not practicable because, as work progresses on the Shop Road Extension construction project, it soon will be impossible to halt construction...” (Appellant’s Motion, p. 1). However, Appellant’s reasoning does not have anything to do with why filing initially in the Circuit Court is impractical; rather, Appellant’s statement merely seems to argue the urgency of its claim. As noted *infra*, Appellant’s claim is not ‘urgent’ as it has known about this issue and has done nothing for months. (See also Respondent’s Arguments at Section IV. D. 1., *infra*.)

As alleged in its Complaint filed on December 15, 2016 at ¶¶97-105, Appellant sought either to enjoin the execution of the Shop Road Contract between the County and McClam (¶104) or if the contract was awarded, alternatively “to suspend the contract and direct McClam to conduct no work on the contract until such time as the Richland County Procurement Review Panel an hear and decide” the Appellant’s protests (¶105). (Appellant’s Documents, pp. RCC-017-018). However, Appellant never brought before the Circuit Court the issue of suspending the construction of the Shop Road Contract if awarded.

Despite Appellant setting forth this request for relief in ¶105 of the Complaint filed December 15, 2016 and ¶ 107 of the Amended Complaint Filed January 19, 2017, Appellant has waited until May 9, 2017, **nearly 5 months** since filing the Complaint, to seek such relief *for the*

*first time* before this Court. The relief requested was not raised nor discussed in Appellant's Motion for Temporary Injunction filed on December 19, 2016, nor was it discussed in Judge Benjamin's Order filed December 22, 2016, denying that Motion. Appellant has made no attempt to raise this issue until the present Motion.

Appellant's argument that it was not practicable to first seek relief before the trial court is without merit. This relief was requested in the Complaint and the Amended Complaint and could have been raised before the Circuit Court on numerous occasions, but at the very least, it should have been raised after Judge Benjamin denied Appellant's Motion for Temporary Injunction on December 22, 2016. At this time, Appellant knew that the Shop Road Contract would likely be soon executed and that it would be necessary to timely make a request before the Circuit Court for the alternate relief it sought, i.e. to enjoin the commencement of work pursuant to the contract if awarded.

Appellant's Motion should be denied because Appellant did not first seek relief before the trial court as required and it was clearly practicable to do so. If the Court does not grant the County's Motion to Dismiss the Appeal filed by the County on May 19, 2017, the Court should remand this matter to be decided by Judge Benjamin pursuant to Rule 62(c), SCRPC.

#### **IV. LEGAL ARGUMENTS**

##### **A. The Higher Standard for a Temporary Injunction Against a Public Body.**

The South Carolina Supreme Court, in considering a request for a preliminary injunction, opined that a preliminary injunction "should issue only if necessary to preserve the *status quo ante*, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law."

Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010).

The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it. Powell v. Immanuel Baptist Church, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. County of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). Accordingly, the applicant must establish three elements to receive this relief: (1) he will suffer immediate, irreparable harm without the injunction; (2) he has a likelihood of success on the merits; and (3) he has no adequate remedy at law. Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). (Emphasis added)

Compton v. S.C. Dep't of Corr., 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011).

Rule 65 further requires that “no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.” Rule 65(c), SCRCF.

However, when a party attempts to enjoin the acts of a governmental entity or its agency, as is the case here, the public interest is obviously one of the *primary* factors to be considered. “For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases.” Hecht Co. v. Bowles, 321 U.S. 321, 331, 64 S. Ct. 587, 592, 88 L.Ed. 754 (1944). Even if other factors weigh heavily in favor of the plaintiff, public interest may control. “Since the public interest is involved, a showing of irreparable injury does not necessarily entitle the [plaintiff] to relief.” National Dairy Products Corp. v. Greene, 210 F. Supp. 798, 800 (D. Md. 1962). Accord, 43A C.J.S. Injunctions, § 114. “Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling.” City of Harrisonville, Mo. v. W. S. Dickey Clay Mfg. Co., 289 U.S. 334, 338, 53 S. Ct. 602, 603-4, 77 L.Ed. 1208 (1933).

This is the rule long followed by South Carolina courts: “[I]t is a serious matter to enjoin the construction of great public works without a strong showing by the complainant, establishing, prima facie, a clear right to such injunction; and the burden is upon the plaintiff to make such a showing.” Moss v. South Carolina State Highway Department, 223 S.C. 282, 75 S.E.2d 462, 464 (1953). For example, the South Carolina Supreme Court refused to enjoin a bond issue under a public interest analysis:

In a case involving the exercise by public authorities of powers expressly conferred upon them, where there is no clear showing of threatened injury of a material character to the complaining party, and where the granting of interlocutory relief would involve considerable loss to the county by reason of the work already done on the project and serious inconvenience to that section of the public for whose benefit the project was undertaken, a court of equity will not interpose an extraordinary remedy of injunction.

Tallevast v. Kaminski, 146 S.C. 225, 143 S.E. 796, 800 (1928) (Supreme Court refused to issue an injunction pending a decision in the case on its merits.) See also, Furr v. The Town of Swansea, 594 F. Supp. 1543 (D. S.C. 1984).

Thus, the public interest is an important factor where injunctive relief is sought against a public entity. The determination of the appropriateness of an injunction must consider those basic elements of proof required to sustain the interference by a court of equity in ongoing governmental activities: possible irreparable harm to the plaintiff if the injunction is not granted, possible irreparable harm to the defendant if the injunction is granted, and which action would be in the best interest of the public. However, due to the nature of the public works contract at issue, the public interest factor must be given substantial weight.

**B. There is No Likelihood of Success on the Merits as Appellant’s Bid was Non-Responsive.**

1. The County Had No Obligation to Waive Appellant’s Bid Mistake.

As Judge Benjamin found in her Order, the Appellant cannot satisfy the element that it has a likelihood of success on the merits. Compton v. S.C. Dep’t of Corr., 709 S.E.2d at 642. There is no

dispute that the Richardson bid incorrectly listed a non-SLBE certified subcontractor as its designated SLBE subcontractor. The Invitation for Bids required a listing of the SLBE-certified subcontractor in the bid as does RC Ord. 2-644(a)(4)c. It is irrelevant that Richardson's alleged intent was to list a properly certified SLBE certified subcontractor. Cf., William C. Logan & Associates v. Leatherman, 290 S.C. 400, 351 S.E.2d 146 (S.C. 1986)(Supreme Court upheld determination that bid was non-responsive even if subcontractor negligently or intentionally failed to list a subcontractor.)

As noted, the SLBE Ordinance requires that an SLBE certified subcontractor be included in the bid. RC Ord. 2-644(a)(4)c ("A prospective bidder on a county contract shall submit at the time of bid SLBE - Form S providing the name of the SLBE or emerging SLBE subcontractor or subcontractors...)(Emphasis added.) The SLBE Ordinance only allows a waiver of this requirement if the bidder seeks a waiver at the time of the bid. RC Ord. 2-644(a)(4)c. It is undisputed that Appellant failed to comply with this technical requirement.

It is in the County's discretion to determine what is or is not "material" for purposes of determining whether or not a bid is responsive. Indeed, Richardson does not contend that the SLBE requirement is not a material of the Invitation for Bid. In fact, Richardson obviously considers the SLBE requirement to be a material requirement as Richardson asserts that McClam's bid is non-responsive because of a claim that McClam did not properly comply with SLBE requirements, *supra*.

"The governmental agency has the right to determine whether a variance from bid specifications is material or whether to waive it as a mere irregularity, and that determination must be upheld by the courts if supported by any rational basis." Varsity Transit, Inc. v. Bd. of Educ., 130 A.D.2d 581, 582, 515 N.Y.S.2d 520, 521 (App. Div. 1987). And see Acme of Precision Surgical Co., Inc. v. Weinberger, 580 F. Supp. 490 (E.D. Pa. 1984) (If a court determines that an agency

procurement decision was rational, inquiry is at an end and preliminary injunction will be rejected.)

As noted by the Wyoming Supreme Court:

It is a general rule that bids for public contracts must substantially comply with the requirements of the specifications for bidding and the directions to prospective bidders. The determination as to whether these requirements are satisfied and the awarding of a contract are acts of discretion which will be enjoined only if done illegally, arbitrarily, capriciously, or unreasonably. Gridley v. Engelhart, S.D., 322 N.W.2d 3 (1982); Conduit and Foundation Corporation v. City of Philadelphia, 41 Pa.Cmwlth. 641, 401 A.2d 376 (1979); Bud Johnson Construction Co., Inc. v. Metropolitan Transit Commission, Minn., 272 N.W.2d 31 (1978); LeCesse Bros. Contracting, Inc. v. Town Board of Town of Williamson, 62 App.Div.2d 28, 403 N.Y.S.2d 950 (1978); Kelly v. Zamarello, Alaska, 486 P.2d 906 (1971); Wester v. Belote, 103 Fla. 976, 138 So. 721 (1931); Maryland Pavement Co. of Baltimore City v. Mahool, 110 Md. 397, 72 A. 833 (1909).

State v. Weisz & Sons, 713 P.2d 176, 186 (Wyo. 1986).

That the Appellant did not follow the requirements of the SLBE Ordinance or Invitation for Bid and submitted *under oath* a non-SLBE certified subcontractor is a rational basis for the County to determine that the bid was non-responsive. (Appellant's Record, pp. RCC 232-292; Affidavit of Christy Swofford, ¶¶8-12.) Presumably, before signing a statement made under oath, a bidding contractor would have carefully reviewed its bid to make sure what it is stating is accurate. The failure by Appellant to abide by the simple process of making sure what it swore to be true was indeed true is a rational basis the County to determine that the mistake was not a minor one. (*Id.*, Affidavit of Christy Swofford, ¶11.) If the Appellant has made such a mistake under oath, the County can legitimately question whether or not the rest of the Appellant's bid, including those portions that were not under oath, is trustworthy and accurate. (*Id.*, Affidavit of Christy Swofford, ¶12.)<sup>7</sup>

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<sup>7</sup> RC Ord. Section 2-621.1 requires that the Appellant protest first to the County Procurement Office; the aggrieved person "may protest to the director of the office of procurement..." RC Ord. Section 2-621.1(a). Per Jennifer Wladischkin's May 12, 2017 letter, she is reviewing the protest now.

The conclusion of the County that the Appellant's bid was non-responsive is consistent with well-established case law. The failure to list a minority owned enterprise or other goal-oriented program that is a required submittal of the bid is not a minor mistake and makes the bid nonresponsive. Carol Bolander & Sons Co. v. Minneapolis, 438 N.W.2d 735, 738 (Minn. Ct. App. 1989)("Although arguably not a matter affecting the factors determining the amount of the bid, the omission of listing a [minority owned enterprise] is taken out of the minor defect category by the plans and specifications which deem the failure to comply with [minority owned enterprise] participation requirements as grounds for nonresponsiveness.")

Assuming for purposes of argument that everything the Appellant alleges is true, and that the listing of Lad, Inc. as the certified SLBE was a "scrivener's error" and/or a clerical mistake,<sup>8</sup> the failure to comply with the strict requirement in the Procurement Ordinance, the SLBE Ordinance, and the Bid Instructions does not mean that the Appellant is entitled to have its bid accepted. See Kinsey Contracting Co. v. Fayetteville, 106 N.C. App. 383, 416 S.E.2d 07 (N.C. App. 1992)(Court in denying motion for temporary injunction found that failure of a bidder to include audited financial statement with bid, even though a mistake, did not mean that the governmental agency's rejection of that bid as non-responsive was improper.)

As noted in a Florida case under similar circumstances:

The unfair bidding advantage one contractor derives from the failure to list required subcontractors is generally threefold: (1) it provides the precious few minutes which

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<sup>8</sup> Black's Law Dictionary defines "scrivener's error" as a synonym for "clerical error." A "clerical error" is one "resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination." Black's Law Dictionary 563 (7th Ed. 1999). See U. S. v. Gibson, 356 F. 3d 761 (7<sup>th</sup> Cir. 2004). Also see, BusinessDictionary.com: "Legal principle that a map-drafting or typographical error in a written contract may be corrected by oral evidence if the evidence is clear, convincing, and precise. If such correction (called scrivener's amendment) affects property rights then it must be approved by those affected by it." Thus, a "scrivener's error," contrary to the claim of the Appellant, does not limit the materiality of a mistake in a bid; the term is more applicable to legal intent of contracts and orders.

may be saved by failing to provide a name for the appropriate blank on form D-1 and matching the name with the price used in the bid computation, (2) it allows the potential for speculation, by use of a phantom price and efforts to shop that item or trade until a subcontractor can be found at the speculative contract price, and (3) it permits a successful bidder to accept additional subcontractor bids after the bid opening, giving the opportunity for undercutting the low subcontractor on whom he relied in formulating his bid. These policy reasons ... thus prevent competitive advantage, insure the quality of the subcontractors, insure public confidence in the bidding process, and encourage future competition

E. M. Watkins & Co. v. Bd. of Regents, 414 So. 2d 583, 587 (Fla. Dist. Ct. App. 1982).

That the public may pay a higher price on a particular project is not a basis upon which to disrupt the bidding requirements; as noted by one court, while “the public may be occasionally harmed by the failure to waive a bid requirement, ... ‘the overriding interest in insuring the integrity of the bidding process is more important than the isolated savings at stake.’” Gaglioti Contracting, Inc. v. City of Hoboken, 307 N.J. Super 421, 704 A. 2d 1301, 1306 (Sup. Ct. 1997), quoting Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 325, 650 A.2d 748 (1994). As noted *supra*, there are important policy considerations that support the determination by the County that a bid is non-responsive and those policy considerations control over the individual interests of a bidder.

Thus, the County certainly had a rational basis in determining that Appellant’s bid was non-responsive and that the bid did not comply materially with the bidding specifications and Richland County Ordinances. In these circumstances, an injunction is not appropriate. See e.g. Bean Dredging Corp. v. United States, 22 Cl. Ct. 519 (1991) (Fact that plaintiff would be irreparably harmed if injunction not granted did not outweigh the fact that disappointed bidder was unlikely to succeed on the merits.)

2. Appellant's Claim that McClam's Bid was Non-Responsive is Erroneous.

Appellant has raised a new issue that was not part of Judge Benjamin's Order. Appellant claims now that the McClam bid was non-responsive, and therefore that McClam's bid should be thrown out and Appellant awarded the Shop Road Contract. (Appellant's Memo in Support of Motion, pp. 10-13.) Appellant's main legal argument is that the Ordinance does not allow a bidding contractor to use the same subcontractor to meet SLBE and DBE goals in a contract. Appellant's factual argument is based on some emails from a Richland County employee that it found in response to an FOIA request to Richland County.

However, Appellant cites to nothing in the Richland County Ordinances that prohibit using the same subcontractor to fulfill SLBE and DBE requirements. In fact, the County on Penny Transportation Projects has ultimately allowed any general contractor bidding to use the same subcontractor(s) for all or some of both the SLBE and DBE requirements. (Respondent's Record, p. 105; Second Perry Affidavit, ¶11).

Indeed, Appellant ignores that at the Pre-Bid Meeting for the Shop Road Project on August 10, 2016, the question about counting the same subcontractor as both SLBE and DBE was specifically asked and answered affirmatively. (Respondent's Record, pp. 105-106; Second Perry Affidavit, ¶12). This response was then printed and the Request for Bids was supplemented with Addendum 1 outlining this information. (Respondent's Record, pp. 105-106, 173; Second Perry Affidavit, ¶12, Ex. B).

Specifically, Addendum 1, Section D, contains the following Question and Answer:

Q: Can subcontractors be included on both SLBE and DBE Participation Forms and be credited toward both percentages?

A: Yes

(Respondent's Record, pp. 105-106, 173; Second Perry Affidavit, ¶¶12, 13, Ex. B). Addendum 1, Section E also shows Richardson Construction representative Joseph Richardson signing in as attending the Pre-Bid Meeting. (Respondent's Record, pp. 105-106, 179; Second Perry Affidavit, ¶12, Ex. B).

Therefore, that the same subcontractor could be used for SLBE and DBE work on the Shop Road Contract was explained twice to Appellant: first during the Pre-Bid Meeting for the Shop Road Project, attended by Appellant, and again in Addendum 1 to the bid package (which became part of the Request for Bids.) (Respondent's Record, pp. 106; Second Perry Affidavit, ¶13.) Appellant did not challenge this information before it submitted its bid, so it hardly can raise that issue after the fact. Appellant was required to challenge this position of the County. RC Ord. 1-621.1 requires:

Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation or award of a contract may protest to the director of the office of procurement. The protest, setting forth the grievance, shall be submitted in writing within ten (10) days after such aggrieved person knows or should have known of the facts giving rise thereto.

It is well established in South Carolina that the failure to comply with a notice provision for protest in a procurement matter waives the bidder's right to contest that issue. In Re: Protest of the Computer Group, 1992 SC CPO LEXIS 10, \*9-10; In Re: Protest of Oakland Janitorial Service, Inc., 1988 SC CPO LEXIS 6, \*10-11. Appellant is thus procedurally barred from protesting the McClam bid.

Appellant's argument is therefore a frivolous, ex post facto argument that it has manufactured from emails that were not part of the bid package, and therefore meant nothing with regard to the Shop Road Contract. Again, Appellant also does not cite any provision of the Ordinance that says the County cannot use the same subcontractor for both SLBE and DBE goals. Appellant's entire McClam argument is neither supported by the actual practice of the County or the language in the

Ordinance. It is patently frivolous and an attempt to manufacture a controversy and a claim from emails that were not part of the final bid package and Shop Road Contract.

**C. There is No Right to An Injunction In the Richland County Procurement Ordinance.**

“A bidder on a government contract has no legally enforceable rights against the award of the contract to a competitor other than those the government has seen fit to confer.” Coyne-Delany Co. v. Capital Dev. Bd., 616 F.2d 341, 342-43 (7th Cir. 1980)(Overruling District Court’s issuance of preliminary injunction against Illinois on procurement dispute.)

The Appellant has no legal right to an injunction interfering in the prosecution of the Shop Road Project contract granted by the Richland County Procurement Code. RC Ord. 2-621.1(e) provides in pertinent part: “[a]pp~~eal~~ to the procurement review panel shall not stay issuance or execution of a contract.” (Emphasis added.) Therefore, the Richland County Procurement Code specifically provides that an appeal by a bidder does not stay the execution of a contract. Obviously then, if the Ordinance allows the execution of a contract even when a protest has been filed, the Ordinance allows the performance of such contract after the protest has been filed. This is the law of Richland County and the law that Appellant knew when it submitted its bid.

Indeed, the determination that there is no right to a stay of execution of a contract with Richland County is an exercise of the constitutional right of Richland County to set its own procurement laws under the principles of home rule. As stated by the South Carolina Court of Appeals:

That local governments should be afforded a reasonable degree of latitude in devising their own individual procurement ordinances and procedures is entirely consistent with our state's now firmly rooted constitutional principle of "home rule." By the ratification of Article VIII of our state constitution in 1973, substantial responsibility for city and county affairs devolved from the General Assembly to the individual local governments. "Implicit in Article VIII is the realization that different local governments have different problems that require different solutions." Hospitality Ass'n of South Carolina v. County of Charleston, 320 S.C.

219, 230, 464 S.E.2d 113, 120 (1995); see also Knight v. Salisbury, 262 S.C. 565, 571, 206 S.E.2d 875, 877 (1974) (opining that the constitutional amendment providing for home rule was "prompted by the feeling that Columbia should not be the seat of county government, and that the General Assembly should devote its full attention to problems at the state level"). In addition, Article VIII mandates that "all laws concerning local government shall be liberally construed in their favor." S.C. Const. art. VIII, § 17. Coordinate with the principle of home rule, South Carolina Code section 4-9-25 empowers counties to enact regulations, ordinances, and other laws provided they are consistent with the general laws of our state. S.C. Code Ann. § 4-9-25 (Supp. 2003).

Glasscock Co. v. Sumter County, 604 S.E.2d at 721-22. Richland County consistent with home rule enacted the Procurement Ordinance and made the policy decision that an unsuccessful bidder's remedy in the event that the County determined it would execute a contract was the recovery of bid preparation costs. The Appellant may not like that policy decision, but that is the law under which the Appellant submitted its bid and it is so bound.

Further, in this case, the Richland County Council itself awarded the contract to McClam upon recommendation of County staff. As noted, RC Ord. 2-593 gives only County Council the authority to approve a contract over \$100,000. Courts do not disturb such decisions by public bodies:

In reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives. Such decisions 'should not be upset on appeal unless [they are] arbitrary, unreasonable, in obvious abuse of discretion, or in excess of lawfully delegated power.'

Sloan v. Greenville County, 356 S.C. 531, 555-56, 590 S.E.2d 338, 351 (Ct. App. 2003) (quoting Smith v. Georgetown County Council, 292 S.C. 235, 238-39, 355 S.E.2d 864, 866 (Ct. App. 1987)).

"To plunge the courts into the evaluation process of bidding and awarding of contracts will lead to interterminal delays. The judicial process does not lend itself to the solution of such problems. State v. Weisz & Sons, 713 P.2d 176, 187 (Wyo. 1986).

There is no argument or evidence submitted by Appellant here that the decision of County Council was arbitrary, unreasonable, an obvious abuse of discretion, or in excess of lawfully delegated

power. Therefore, the Appellant has not met its high burden to establish that it is entitled to a right to an injunction.

**D. An Injunction is Not Appropriate Because the Appellant Will Not Suffer Irreparable Harm if Injunctive Relief is Not Granted.**

1. Appellant's Delay Means No Irreparable Harm.

As noted, Appellant's Motion for Temporary Injunction seeking to prohibit the Shop Road Contract from being executed was denied on December 22, 2016. The Shop Road Contract was executed on January 11, 2017 and work began on February 13, 2017. However, the Appellant did nothing for five months and did not try to stop the County from executing the Shop Road Contract by seeking immediate appellate relief, nor did the Appellant file any sort of motion to 'suspend' the work under the Shop Road Project in the five months after that, even though the Appellant was well aware of its claims relative to the position of Procurement Director and composition of the Procurement Review Panel as early as January 19, 2017, when it filed its Amended Complaint.

"Equity aids the vigilant, not those who slumber on their rights." Hemingway v. Mention, 228 S.C. 211, 217, 89 S.E.2d 369, 372 (1955). A plaintiff's delay in seeking a preliminary injunction is "quite relevant to balancing the parties' potential harms." Quince Orchard Valley Citizens Association, Inc. et al. v. Donald P. Hodel, et al., 872 F.2d 75, 79-80 (4th Cir. 1989). "Since an application for preliminary injunction is based upon an urgent need for protection of [a] Appellants' rights, a long delay in seeking relief indicates that speedy action is not required." Id. (citation omitted) (the Quince Orchard court held that plaintiffs' 6-month delay in seeking an injunction to stop construction of a highway indicated an absence of irreparable harm.) See also, John Lemmon Films, Inc. v. Atlantic Releasing Corp., 617 F. Supp. 992, 996 (W.D. N.C. 1985) ("Perhaps even more telling of the absence of convincing proof that the Appellant would suffer irreparable harm is the Appellant's [seven-month] delay in seeking an injunction.")

The Appellant can hardly complain of irreparable harm while it, like the plaintiff in Quince

Orchard Valley Citizens Association, Inc., slumbered on any rights it might have had and brought its Motion only after the Shop Road Project and McClam were well underway.

Appellant's motion is also barred by the doctrine of laches. The equitable doctrine of laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence to do what in law should have been done." Robinson v. Estate of Harris, 389 S.C. 360, 372, 698 S.E.2d 801, 807 (2010). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." Chambers of S.C., Inc. v. County Council for Lee County, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice. Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988).

Here, Appellant is clearly guilty of laches in bringing this Motion as first, it allowed a nearly five month delay from the denial of its prior Motion to the filing of the current Motion. Second, such a delay was unreasonable, as it allowed the County and McClam to not just execute the Shop Road Contract, but then McClam extensively progress on the work on the Shop Road Project in the interim. Third, both the County and McClam are prejudiced by the delay because the termination of McClam's contract would result in delay to the Shop Road Project and termination costs that would waste County money. Thus, the Appellant cannot show irreparable harm.

2. Appellant's Loss of Income of Profit is Not Irreparable Harm.

The Appellant claims that it will suffer irreparable harm because it would not get a "re-bid of the contract or outright award of the contract to RCC," but this is not the *ultimate* harm Appellant

actually claims. (Appellant's Motion, p. 10.) Logically, because Appellant seeks to force the County to accept Appellant's bid, the Appellant actually claims irreparable harm due to its lost income and profits that it would have made *had it been awarded the Shop Road Project contract*.

However, loss of income alone does not constitute irreparable harm sufficient to support injunctive relief. See Morton v. Beyer, 822 F.2d. 364, 372 (3rd Cir. 1987) and Philips Petroleum Co. v. U. S. Steel Corp., 616 F. Supp. 335, 338 (D. Del. 1985) ("Nevertheless, even an irrevocable monetary loss, barring some special or onerous hardship, presents insufficient justification for a preliminary injunction.") "Moreover, mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay do not constitute irreparable harm." Fairplain Development Co. v. Freeman, 512 F. Supp. 201, 203 (N.D. Ill. 1981). In order for there to be injunctive relief, there must be something more than just economic harm to constitute irreparable harm. Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 626 S.E.2d 34, 37 (Ct. App. 2005). Further, if the likelihood of success on the merits is remote, there must be a correspondingly stronger showing of probability of irreparable injury to recover. Furr v. Town of Swansea, 594 F. Supp. at 1552. Thus, Appellant has not stated any actual harm that is a legal basis for injunctive relief against a public entity.<sup>9</sup>

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<sup>9</sup> Indeed, there is no stated amount of any financial loss by Appellant or explanation of the amount of that loss in its pleadings or filing. The lack of evidence of any actual harm is fatal to Appellant's claim of irreparable harm. Smith & Wesson v. United States, 782 F.2d 1074, 1082 (1<sup>st</sup> Cir. 1986). Cf. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392-93, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006) (Irreparable harm may not be presumed but must be proven.) Finally, there is no evidence that Appellant would have even made a profit and thus suffered a loss. "Perhaps more importantly, it is not clear that missing out on the contract actually damaged [plaintiff] at all - that it would have profited on the contract is unsupported in the record and inherently conjectural." C.S. McCrossan Constr., Inc. v. Minn. DOT, 946 F. Supp. 2d 851, 859 (D. Minn. 2013).

**E. An Injunction is Not Appropriate Because the Appellant Has An Adequate Remedy at Law.**

1. The Potential Award of Bid Preparation Costs is An Adequate Remedy at Law.

One of the requirements for a party seeking an injunction is that the party show the Court that it would have no adequate remedy at law. Xepapas v. Richardson, 149 S.C. 52, 146 S.E. 686, 692 (1929). Regardless, in this case, Appellant has an adequate remedy at law and therefore is not entitled to injunctive relief. As noted supra, RC Ord. 2-621.1(f) provides that if the Procurement Review Panel finds that the protest is meritorious, the Panel “**may award reimbursement to the protestant of reasonable bid preparation costs.**” (Emphasis added.) This provision for monetary relief is an adequate remedy at law for Appellant should it eventually prevail. This is similar to the well-established framework under the South Carolina Procurement Code. See Paddock Equipment Co. v. University of S. C., 289 S.C. 219, 345 S.E.2d 749 (Ct. App. 1986)(citing S.C. Code Section 11-35-4210.<sup>10</sup>) Also see S.C. Code Section 11-35-4310(4)(providing for the recovery of reasonable bid preparation costs to a bidder who successfully protests a procurement decision by a state agency after the contract being protested is already awarded.)

It is well settled that where under a government procurement system a party has the statutory remedy of being reimbursed its bid preparation costs, that party has an adequate remedy at law so that there can be no injunction. Fairplain Development Co. v. Freeman, 512 F. Supp. 201, 203-4 (N.D. Ill. 1981)(Where the court stated in denying a temporary injunction: “If Fairplain prevails on the

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<sup>10</sup> The remedies cited in § 11-35-4310 are the exclusive remedies available in a protest under the South Carolina Procurement Code. Unisys Corp. v. S.C. Budget and Control Bd., Div. of General Services Information Technology Management Office, 346 S.C. 158, 551 S.E.2d 263 (2001). As the Supreme Court held in Unisys, “because a statute waiving the State’s immunity must be strictly construed, the State can be sued only in the manner and upon the terms and conditions prescribed by Statute.” Id., 364 S.C. 172, 551 S.E.2d 270. The same applies to the Richland County Procurement Ordinance at RC Ord. 2-621.1(f). The Appellant is limited to its remedy stated in the Ordinance.

merits of the present case, Fairplain should be able to recover its costs incurred in the preparation of the bid despite the fact that Fairplain was not permitted to submit the bid to the GSA. Recovery of these damages is considered to be an adequate remedy at law where the court is asked to enjoin the federal procurement process.”) See also Cincinnati Electronic Corp. v. Kleppe, 509 F.2d 1080, 1089 (6<sup>th</sup> Cir. 1975). The Court in Lametti & Sons, Inc. v. City of Davenport, Iowa, 432 F. Supp. 713, 715 (S.D. Iowa 1975) stated:

The plaintiff has an adequate remedy at law. ... While bid preparation costs may not be an adequate remedy in light of loss of profits on this project, the fact that plaintiff would not be completely without a remedy is an important consideration. A mere bidder acquires no legally enforceable contract rights; the City could have rejected all of the bids.

And see Delta Data Systems Corp. v. Webster, 755 F.2d 938, 940 (D.C. Cir. 1985) (Even where unsuccessful bidder had a great likelihood of success of prevailing in its arguments that other party was wrongfully awarded contract, no injunction would be granted because unsuccessful bidder limited to its statutory remedy of bid preparation costs).

This rule applies in disputes under the South Carolina Procurement Code as well. The South Carolina Procurement Review Panel, in In Re: Protest by Gregory Electric Company, Inc., Case No. 1989-17, 1990 WL 10008052 (S.C. Procure. Rev. Panel Jan. 26, 1990) (Respondent’s Record, pp. 33-34), denied injunctive relief under the same reasoning where only bid preparation costs were the remedy:

It has been repeatedly held, however, that 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. This is true even though the bidder is limited to recovery of bid preparation costs. ...

In this case Gregory does have an adequate remedy at law. The Procurement Code in § 11-35-4210 provides that a bidder who claims it should have been awarded a contract but is not may be awarded a “reasonable reimbursement amount, including

reimbursement of bid preparation costs, and ... such other and further relief as justice dictates . . . .”<sup>11</sup>

Id. Thus, the arbitral authority in South Carolina that deals most often with procurement disputes follows this well-established law.

Therefore, Appellant has an adequate remedy at law even if it ultimately prevails on the merits of this controversy before the Procurement Review Panel, so injunctive relief is not appropriate. That the remedy may not be the remedy the Appellant wants does not erode the legal effect of a remedy. Indeed, in the private sector parties often contract for limited remedies; Appellant can hardly complain of a limited remedy in the Ordinance of Richland County of which Appellant had constructive notice when it submitted its bid.

2. The Procurement Review Panel Cannot Provide the Relief Requested By Appellant.

The reason Appellant claims the Temporary Injunction should be granted is that it wants the Procurement Review Panel to order the County to terminate the Shop Road Contract with McClam and award the Shop Road Contract to Appellant, or order an entire re-bid of the Shop Road Project. (Appellant’s Motion, p. 10.) However, contrary to Appellant’s assertion that the Procurement Review Panel can order the re-bid of the Shop Road Extension Contract, or it can order that the Shop Road Contract be awarded outright to Appellant, the Procurement Review Panel would have only one duty in this matter should Appellant properly appeal to it: to determine whether or not the Appellant’s protest was meritorious and thus whether the Appellant is entitled to its bid preparation costs. RC Ord. 2-621.1(f). There are several factual and legal reasons for this.

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<sup>11</sup> This section has been renumbered as S.C. Code § 11-35-4310(4).

The Procurement Review Panel cannot order the rebid of the Shop Road Extension Contract; that contract has been awarded and is underway, so that the scope of the a new Shop Road contract would be significantly different from the original Shop Road Contract. (Respondent's Record, pp. 104-105; Second Perry Affidavit, ¶¶8, 10.) Not only would the scope of the project in the new contract be different, but the pricing likely would be different as well. (Respondent's Record, p. 104; Second Perry Affidavit, ¶8.) The same bid package or contract could not be offered to another contractor, so the Shop Road Contract cannot be rebid. (Respondent's Record, p. 104; Second Perry Affidavit, ¶9.) Simply put, the Shop Road Contract cannot be simply turned over to another contractor or be rebid under the same scope of work. (Respondent's Record, p. 104; Second Perry Affidavit, ¶9.)

Further, Richland County's Ordinance nowhere states that the Procurement Review Panel has the authority to direct the County to terminate a previously awarded contract.<sup>12</sup> As stated, the Ordinance states that the County can award the contract even if a protest of the contract is pending. Thus, the common sense result is that the Procurement Review Panel, since it cannot order that a County contract be terminated, may only award to the Appellant in this case its bid preparation costs if the protest is meritorious. The remedy sought by the Appellant to justify injunctive relief simply does not exist.

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<sup>12</sup> RC Ord. 2-621.1(f) says in pertinent part: “[u]pon a finding that the appeal is meritorious, the review panel may direct an award of contract to the protestant, may require that a contract be re-bid, and [sic] may award reimbursement to the protestant of reasonable bid preparation costs.” However, RC Ord. 2-621.1(e) says in pertinent part: “[a]ppel to the procurement review panel shall not stay issuance or execution of a contract.” The actions by the Procurement Review Panel permitted by the Ordinance do not allow it to order a rebid of a contract or re-award of a contract if the contract has already been executed, as permitted by subsection (e). If the Panel has such authority, the Ordinance would specifically state that the Panel could do so “notwithstanding the execution of a contract” between the County and a bidder, or words to that effect.

Finally, Appellant's arguments that the Procurement Review Panel is improperly constituted do not affect this analysis. There are three members of the Procurement Review Panel. The Ordinance does provide for five members of the Procurement Review Panel. However, as stated, the Ordinance provides that three members of the Procurement Review Panel constitute a quorum. RC Ord. 2-621.1(c).

Nothing in the Ordinance states that the Panel may not convene and hear a review of the Procurement Director's decision on a protest without all five members appointed. Indeed, the contrary is true; only three members are needed for a quorum. If five members were required for the Panel to be constituted and render decisions, that language that three members constitute a quorum would be essentially meaningless. A statute (or ordinance) should be so construed that no word, clause, provision or part shall be rendered surplusage. State v. Sweat, 379 S.C. 367, 665 S.E.2d 645, 665 (Ct. App. 2008).

In similar circumstances, a court has held that even though the full complement of required appointed members of a governmental entity had not been appointed, the majority of those that had been appointed was sufficient to create a quorum and for the entity to legally carry out its duties. Township Committee of Edgewater Park v. Edgewater Park Housing Authority, 187 N.J. Super 588, 455 A.2d 575 (N.J. Sup. Ct. 1982). In Edgewater Park, the defendant Housing Authority lacked a full membership because the mayor and another official had failed to fill two of the seven required seats.<sup>13</sup> 455 A.2d at 579. With regard to the other official, a Director, the Court observed "[s]ince the Director has never represented, the Authority has been deprived of his views." Id.

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<sup>13</sup> The ordinance creating the Housing Authority, like the ordinance creating the Procurement Review Panel, using the mandatory language "shall" in terms of the number of seats on the Authority. Edgewater Park Housing Authority, 455 A.2d at 577.

Notwithstanding this argument (similar to one made by Appellant here), the Court held that the Housing Authority was properly authorized to act.

Under the common law rule, where a definite body existed a majority of the entire membership of that body constituted a quorum and a majority of the quorum could perform any act which the body was empowered to perform. This rule applies unless the applicable legislation provides otherwise.

Edgewater Park Hous. Auth., 455 A.2d at 579 (citation omitted.) The Court then explained:

The existence of vacancies in the membership of the Edgewater Park Housing Authority did not affect the ability of that Authority to act, so long as the statutory quorum was present. A contrary rule would be prohibitively onerous. If all seats provided by legislation for a public body were required to be filled before that body could act, through a quorum, it would be denied all power to carry out its responsibilities whenever a vacancy occurred by reason of death, resignation or removal for cause, until the vacancy was filled. It would not be able to fill a vacancy, since it could not act. As a matter of necessity, therefore, the rule must be otherwise, as it is.

Edgewater Park Hous. Auth., 455 A.2d at 580. As the Court concluded, “[a] vacancy caused by failure of appointment invites no different rule.”

Nothing in the Richland County Ordinance prohibits a majority of Procurement Review Panel members from acting as a quorum; indeed the opposite is true. Further, nothing in the Ordinance states that there must be five Panel members appointed for the Panel to conduct business. Therefore, Appellant’s argument that there must be a five person Procurement Review Panel is also not supported by the Ordinance.

3. The Appellant’s Supplement to its Motion Attacking the Position of Acting Procurement Director is Nonsensical.

As noted *supra*, Appellant in its Supplement also complains that there is no Procurement Director for Richland County. However, Appellant is wrong factually and has no legal basis to complain about who the County assigns that position.

First, Appellant has no legal right to complain about who is the Acting Procurement Director, and Appellant has cited no authority in support of such a proposition. That is because Appellant has no authority or right to object to whomever the County chooses to appoint as Procurement Director, Assistant Procurement Director, or Acting Procurement Director.

The County is entitled to choose its form of government pursuant to the County Home Rule Act, S.C. Code §§ 4-9-10 to 4-9-1230 (Law. Co-op. 1976 & Supp. 2016). Specifically, the County Home Rule Act also gives a county the authority “to develop personnel system policies and procedures for county employees by which all county employees are regulated except those elected directly by the people, and to be responsible for the employment and discharge of county personnel in those county departments in which the employment authority is vested in the county government.” S.C. Code § 4-9-30(7). The County Home Rule Act provides that a County has this right for types of county governments enumerated in S.C. Code § 4-9-20, which specifically includes the “Council-administrator form.” S.C. Code § 4-9-20(c).

The County is governed by the Council-City Administrator form of government pursuant to S.C. Code §§ 4-9-610 through 670 which allows the County Administrator to exercise broad authority over county personnel. See e.g., Eargle v. Horry County, 344 S.C. 449, 451, 545 S.E.2d 276, 277 (Ct. App. 2001). “[T]he county administrator is the administrative head of county government.” Angus v. Burroughs & Chapin Co., 368 S.C. 167, 628 S.E.2d 261, 262, n. 3 (2006). The County adopted this form of Council-Administrator form of local government by RC Ord. 2-84.

Under the Council-Administrator form of government, the County Administrator has broad authority to hire, fire and assign County employees. RC Ord. 2-87. This includes the ultimate authority to appoint a County employee to a particular position. The Richland County Ordinance

also specifically contemplates that subordinates to any position in Richland County government, not otherwise expressly excluded, can perform the duties of a designated official. The RC Ordinance allows “the head of a department or some other county officer or employee to do some act or perform some duty, it is to be construed to authorize the head of the department or other officer to designate, delegate and authorize subordinates to perform the required act or perform the duty unless the terms of the provision or section specify otherwise.” See RC Ord. 1-2 Definitions; “*Delegation of Authority.*”

Thus, the County Administrator, or as in this case, his designated Assistant County Administrator, is well within his discretion to assign a Richland County employee as Acting Director of Procurement in the absence of a Director of Procurement. Appellant simply has no legal basis or standing to question that decision.

Appellant’s theory would prevent the orderly administration of County business by requiring there to be a permanent position of “Director of Procurement” with no person acting in that capacity on a temporary basis. It is absurd to suggest that the County cannot act through duly delegated surrogates for positions that are vacant or where the person holding that position is unavailable because of, for example, illness or vacation.

Thus, the position of Director of Procurement need not be filled as long as there is an “*Acting*” Director of Procurement. As noted above, Jennifer Wladischkin, an Assistant Procurement Director/Manager, has been appointed Acting Procurement Director/Manager. (See Affidavit of Jennifer Wladischkin, ¶2; Ex. B; May 11, 2017 letter; Respondent’s Record, pp. 195, 204). The job description for the Assistant Procurement Director/Manager includes among the duties “[p]erforms duties of department Director as required in his/her absence.” (See Wladischkin Affidavit, ¶2, Ex. A; Respondent’s Record, pp. 195, 198-203). That is clearly what Ms.

Wladischkin is doing as *Acting* Procurement Director.<sup>14</sup> Appellant has no factual basis to attack what is a simple, legal, and normal delegation of authority in County government.

Finally, Appellant's complaints about not having a decision on its protest from Richland County shortly will be moot. As noted by her letter of May 18, 2017, Ms. Wladischkin as Acting Procurement Director will make a determination on the protests within ten days of the date of her letter, and in the event a party wishes to appeal from her decision, a meeting of the Richland County Procurement Review Panel has already been set for June 27, 2017 if there is an appeal. (See Wladischkin Affidavit, ¶7, Ex. G; Respondent's Record, pp. 196, 214-215). Appellant has directly questioned Ms. Wladischkin's qualifications and seems intent on attacking her even though she has only been on the job since April 29, 2017 and has told Appellant that she is working on the protest.

**F. There is a Substantial Public Interest that the Shop Road Project Not be Delayed.**

Time is of the essence for this contract to be completed without interference because, among other things, the County has committed to China Jushi that the first 1000 feet of the Shop Road Extension will be completed by December 31, 2017. (Respondent's Record, pp. 37, 40-86; First Affidavit of Rob Perry, ¶4, Ex. A.) Should the County fail to honor its obligation, the County's relationship with China Jushi could be significantly harmed.

There are other public interest reasons for the Court not to interrupt the progress of the Shop Road Project. McClam has already completed significant work under the Shop Road Contract, including mobilization, construction stakes lines & grades, traffic control, CPM progress schedule, clearing and grubbing, unclassified excavation, muck excavation, permanent construction signage; design, detail of PC floorless culvert, silt fence, and silt basins, among other things. (Respondent's

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<sup>14</sup> Appellant's multiple conspiracy theories are so frivolous as to not merit a response.

Record, pp. 102-103; Second Perry Affidavit, ¶6). Based on time expended in the CPM Schedule, McClam is approximately 16.5% complete with the Shop Road Project. Based on expenditures to date by the County to McClam (that should include any held retainage), McClam is approximately 15.5% complete with the Shop Road Project. (Respondent's Record, pp. 102-103; Second Perry Affidavit, ¶6). Richland County thus far has paid McClam \$3,428,604.95 through the end of April, 2017. (Respondent's Record, p. 103; Second Perry Affidavit, ¶6).

Further, if a new contractor, such as RCC, was brought in to finish the Shop Road Project, it is unknown what the schedule for completion of the Shop Road Project would be with the new contractor. (Respondent's Record, p. 104; Second Perry Affidavit, ¶9). If the County were to terminate the Shop Road Contract with McClam, there would inevitably be as much as a two month delay in the progress of the Shop Road Project while McClam demobilized and a new contractor would mobilize to the project site. (Respondent's Record, pp. 103-104; Second Perry Affidavit, ¶7). Also, the County would have to pay McClam all of McClam's costs associated with a termination for convenience, such as all incurred costs. (Respondent's Record, pp. 103-104; Second Perry Affidavit, ¶7.) Further, the County has already paid McClam \$335,078.38 in mobilization costs (of a total bid estimate by McClam of \$670,156.75 total mobilization costs), but should Richardson take over, Richardson's bid states that it would have (what would be an additional) \$500,000 in mobilization costs. (Respondent's Record, pp. 103-104; Second Perry Affidavit, ¶7.) This would be a tremendous waste of County resources.

Finally, even if the County was late on the Shop Road Extension Project and China Jushi did not abandon its project, any delay in the construction of the Shop Road Extension would result in delays in fee in lieu of tax payments being paid to the County because fee in lieu of tax payments are only due after a plant has been placed in service. (Respondent's Record, p. 90; Ruble Affidavit,

¶8.) The year one payment to the County would be \$1,469,171 and the year two payment would be \$2,231,308. (Respondent's Record, p. 90; Ruble Affidavit, ¶8.) Also see, Subsection G *infra*.

Preliminary injunctive relief is an extraordinary and drastic remedy. In addition to the usual caution surrounding the granting of such relief, the court is mindful of the overriding concern in cases of this type: avoidance of disruptions in the procurement process absent a clear need for judicial intervention.

Leath, McCarthy & Maynard, Inc. v. Army and Air Force Exchange Service, 604 F. Supp. 514, 518 (N.D. Tex. 1985) (Court refused to grant preliminary injunction when, although plaintiff had a substantial likelihood of success on the merits, an injunction "would disrupt the supply of hosiery to AAFES outposts world-wide.") "Moreover, a preliminary injunction which would enjoin the federal procurement process may disservice the public interest." Fairplain Development Co. v. Freeman, 512 F. Supp. at 204. Indeed, an unsuccessful bidder seeking an injunction of a government procurement process must demonstrate that its interests in obtaining an injunction coincide with the public interest. Atlas Mach. & Iron Works, Inc. v. Secretary of Air Force, 429 F. Supp. 11 (D.D.C. 1977).

The County is operating under a very strict time deadline due to the necessity of starting this project on a timely basis to meet the timeline for the opening of the China Jushi manufacturing facility. The United States Claims Court in a more compelling situation for a plaintiff refused to grant such a preliminary injunction. In Rockwell International Corp. v. United States, 4 Cl. Ct. 1 (1983), the Federal Emergency Management Agency (FEMA) was interested in obtaining a state-of-the-art communications system. The plaintiff bidder in that case was disqualified from the procurement based on a FEMA decision which the court felt lacked a rational or reasonable basis. However, the \$40 million in funds set aside by FEMA to finance the contract for that communications system had to be obligated by an award of the contract prior to October 1, 1983, or it would be lost. Id. at 3.

The Court refused to enjoin the awarding of the contract to another bidder, even though the plaintiff was correct that it should have been allowed a chance to bid, because it would have been

difficult to rebid or re-award contracts prior to the expiration of the funding deadline. *Id.* at 6. While the plaintiff might suffer harm in not being awarded the contract, the federal interest in utilizing the funds while available far outweighed any harm to the plaintiff and therefore an injunction had to be denied. *Id.*

Although the present Motion seeking to enjoin the progress on the Shop Road Project, is does not seek the enjoin the award of the Shop Road Contract (that motion, of course, was lost by Plaintiff), the same considerations apply to the enjoining of the public works that are underway. Indeed, the argument against an injunction is significantly greater now that Appellant failed to seek relief earlier from the Court of Appeals from Judge Benjamin's Order, and the disruption to the Shop Road Project would be even greater if injunctive relief is granted at this very late stage.

Clearly, the great potential harm to the public compels that the equities strongly weigh against the granting of injunctive relief.<sup>15</sup>

**G. If Injunctive Relief is Granted, a Substantial Bond Protecting the County Should be Required.**

Rule 65 and South Carolina law requires that a bond be issued by a plaintiff seeking an injunction to protect the rights of the enjoined party. In this case, as noted above, the financial loss to the County and to the public would be substantial if award of the Shop Road Project is delayed. The County will suffer at least \$8,856 damages per day, or \$797,040 per quarter, that the Shop Road Project is delayed. (Respondent's Record, p. 37; First Perry Affidavit, ¶6). The increased construction costs to the County if the Shop Road Extension Project is delayed by an injunction could at least \$3,250,000. (Respondent's Record, pp. 37-38; First Perry Affidavit, ¶7.) An entire industrial

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<sup>15</sup> McClam would also be prejudiced by injunctive relief. McClam in response to this Motion has submitted arguments and an affidavit outlining the significant harm to McClam should the Motion be granted. This harm to McClam counterbalances any harm to Appellant in failing to grant an injunction. See Caddell Construction Co. v. United States, 7 Cl. Ct. 236 (1985).

project that is a key cog to \$785,000,000 of economic growth and future prosperity of Richland County is depending on the timely award and completion of this project. (Respondent's Record, p. 90; Ruble Affidavit, ¶6.)

While Richardson claims in its Affidavit that it could complete the Shop Road Project two months ahead of schedule, that assumes that Appellant is awarded that contract and work promptly begins. However, if a temporary injunction is granted, the Shop Road Project could end up being rebid or being tied up in court and the appeals process for months. (Respondent's Record, p. 38; First Perry Affidavit, ¶9). Thus, Appellant's claim that it could complete the Shop Road Project on a timely basis is speculation and based on assumptions that are not based on reality.

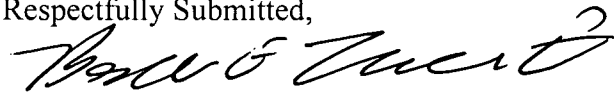
Therefore, should the Court grant a temporary injunction, the County requests that the Court Order that as a condition of the temporary injunction being granted, the Appellant post a bond of at least \$100,000,000. Richland County believes that this amount would represent the possible loss to the County and its citizens assuming a substantial delay in finishing the Shop Road Project. Even then, however, there could be permanent harm as the manufacturer for which this construction timeframe has been created could determine that this sort of delay is not what it bargained for when it came to Richland County, and may have second thoughts about locating here.

Regardless, the core of this issue is that a bond cannot adequately protect the County and its citizens from the harm that a temporary injunction could create. However, given the great public interest at issue, a substantial bond should be required to protect the public as best it can should the Court grant Appellant's Motion.

**V. CONCLUSION**

The Respondent, Richland County, respectfully requests that the Court deny the Motion for Temporary Injunction, and award to Respondent its costs and attorney's fees, on the grounds stated herein.

Respectfully Submitted,



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Benjamin E. Nicholson V  
MCNAIR LAW FIRM, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800  
[nnicholson@mcnair.net](mailto:nnicholson@mcnair.net)

Of Counsel:

Larry C. Smith, Esquire  
Richland County Attorney  
P.O. Box 192  
Columbia, SC 29202

ATTORNEYS FOR RESPONDENT  
RICHLAND COUNTY

May 22, 2017  
Columbia, South Carolina

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

RECEIVED

MAY 22 2017

APPEAL FROM RICHLAND COUNTY SC Court of Appeals  
In the Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2017-000134

Richardson Construction Company, Inc., ..... Appellant,

v.


Richland County, a political subdivision, and  
McClam & Associates, Inc., ..... Respondents.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the Respondent Richland County's Memorandum in Opposition to Appellant's Motion for Expedited Temporary Injunction Pending Appeal, by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to counsel of record at the addresses shown below, on May 22<sup>nd</sup>, 2017:

Richard C. Detwiler, Esquire  
Kathleen M. McDaniel, Esquire  
CALLISON TIGHE & ROBINSON, LLC  
Post Office Box 1390  
Columbia, SC 29202-1390

Alan Peace, Esquire  
HARRELL & MARTIN, PA  
135 Columbia Avenue  
Chapin, SC 29036

  
Ann Shuler

May 22, 2017

Benjamin E. Nicholson, V

nnicholson@mcnair.net  
T 803.799.9800  
F 803.753.3278

**Via Courier**

Honorable Jenny Abbott Kitchings  
Clerk of Court  
S.C. Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RECEIVED  
MAY 22 2017  
SC Court of Appeals

Re: Richardson Construction Company, Inc. v. Richland County, a political  
subdivision, and McClam & Associates, Inc.  
Appellate Case No.: 2017-000134

Dear Madam Clerk:

Enclosed for filing, please find the original and seven copies of Respondent Richland County's Memorandum In Opposition to Appellant's Motion for Expedited Temporary Injunction Pending Appeal, along with the original and one copy of the Certificate of Service.

Please file the original of each in your office and return the file stamped extra copies to me via our courier. By copy of this letter we are serving counsel of record with copies of same.

Very truly yours,

McNAIR LAW FIRM, P.A.



Benjamin E. Nicholson, V

BEN, V:as  
Enclosures

cc: Kathleen McDaniel Esquire  
Alan Peace Esquire  
Richard C. Detwiler Esquire

McNAIR LAW FIRM, P.A.  
1221 Main Street  
Suite 1700  
Columbia, SC 29201

Mailing Address  
Post Office Box 11390  
Columbia, SC 29211

mcnair.net