STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: August 14, 2012)

RAITO, INC.	:	
	:	
vs.	:	**C.A. No. PB 07-3235**
	:	
CARDI CORPORATION, SAFECO INSURANCE CO. OF AMERICA, and GENERAL INSURANCE CO. OF AMERICA	:	
	:	
	:	
CARDI CORPORATION (Third-Party Plaintiff)	:	
vs.	:	
	:	
STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS DEPARTMENT OF ADMINISTRATION, DIVISION OF PURCHASES (Third-Party Defendant)	:	

DECISION

SILVERSTEIN, J. Before the Court is the Third-Party Defendant, Rhode Island Department of Administration (DOA), Division of Purchases' (the State), Motion for Partial Summary Judgment, pursuant to R.I. Super. R. Civ. P. 56. The State seeks partial summary judgment on six of the eight issues raised in the Third-Party Complaint by the Third-Party Plaintiff, Cardi Corporation (Cardi), which purports to assert the pass-through claims of the Plaintiff, Raito, Inc. (Raito), against the State.[1] The dispute concerns the payment of various costs in association with the construction of the I-195 Bridge over the Providence River (the Project). Cardi was the

[1] A subcontractor may "pass through" its claims to the owner—in this case, the State—via the general contractor. See Clark-Fitzpatrick, Inc. v. Gill, 652 A.2d 440, 449 (R.I. 1994); see also Bd. of Governors for Higher Educ. v. Infinity Constr. Servs., Inc., 795 A.2d 1127, 1129 (R.I. 2002) (discussing pass-through doctrine); Jacor, Inc. v. Cardi Corp., 673 A.2d 1077, 1078 (R.I. 1996).

general contractor for the Project, and Raito was its subcontractor. The State, arguing that a majority of the claims are barred as a matter of law, moves this Court to enter partial summary judgment in its favor, and Raito and Cardi have objected to the Motion.

Also before the Court is the State's Motion in Limine pursuant to R.I. R. Evid. 408 (Rule 408 Motion). The State seeks to limit the use of evidence of what it argues are settlement attempts. Raito and Cardi have objected to the Rule 408 Motion as well.

I

Facts and Travel

The instant litigation involves work performed in the construction of what is known as the "Iway." The Project was a two-mile long, multi-year highway construction project, relocating Interstate 195 in Providence, Rhode Island and featuring the construction of a new, 900-foot bridge over the Providence River. See Third-Party Complaint (3d Party Compl.) ¶ 3. In early 2003, the Rhode Island Department of Transportation (RIDOT) made available plans, specifications, and contract documents in order to solicit bids for the Project—the I-195 Relocation, Providence River Bridge, Contract No. 2003-CB-001. Id. at ¶¶ 3-4. Cardi obtained copies of the documents to prepare a bid. Id. at ¶ 5. On May 20, 2003, Raito submitted a subcontract bid to Cardi to furnish and install the steel and concrete support shafts necessary for the new bridge at a price of $3,276,150. Id. at ¶ 6.

Cardi submitted its general contractor bid for a total price of $84,546,192.41 to RIDOT. Id. at ¶ 7. On May 21, 2003, RIDOT opened bids and determined Cardi to be the lowest responsive and eligible bidder. Id. at ¶ 8; Complaint ¶ 7. On June 3, 2003, Cardi and Raito executed a subcontract for Raito to furnish and install the underground concrete and steel support shafts for the bridge. (3d Party Compl. ¶ 9.) Under the subcontract, Raito was to install twenty-

three drilled shafts of various lengths, each eight feet in diameter. (Compl. ¶ 8.) Raito planned to complete its work in thirty-three weeks, and its low-bid was in the amount of $3,305,650.[2] (App. of Exs. in Supp. of 3d Party Def.'s Mot. for Partial Summ. J. (3d Party App.) Ex. 2 (Subcontract).) Raito's bid was unique in its use of the "Supertop," a drilling machine relatively new to use in the area that rotated the shaft casing into the ground rather than using the traditional vibratory hammer method to drive the casing into the ground. See 3d Party App. Ex. 6 (Executive Summary).

Cardi and RIDOT entered into a contract on August 1, 2003, and RIDOT issued Cardi a Notice to Proceed with the Project on August 7, 2003. (3d Party Compl. ¶ 10.) Raito, in its subcontract with Cardi, agreed to be bound by the "plans, specifications, special provisions, addenda and/or any other documents . . . referred to . . . as the 'prime contract' for the project." (3d Party App. Ex. 2 (Subcontract at 1).)

From 2003 to 2006, Raito's construction efforts were allegedly impacted by eight distinguishable issues, causing Raito, it claims, to incur approximately $14.5 million in costs. See Compl. ¶ 12-13. During the construction, Raito made a number of claims for additional compensation, and Cardi submitted those claims to RIDOT for review. (3d Party Compl. ¶¶ 13-14.) Three of the issues were submitted by Raito to Cardi in letters dated November 14, 2005, November 21, 2005, and January 20, 2006. (Compl. ¶ 14.) After receiving instructions from RIDOT to bundle its claims together for consideration, Raito submitted a bundled package to Cardi on March 17, 2007, requesting equitable adjustments.[3] (Compl. ¶¶ 14-15.) In its bundled

[2] The Court does not understand the discrepancy in price as listed in the Third Party Complaint and in the Subcontract agreement; however, it appears to be of no consequence.

[3] An equitable adjustment, in the context of public works construction projects, is a term of art with a common meaning and usage. See 6 Philip L. Bruner and Patrick J. O'Connor, Jr., Construction Law § 19:50 (2012). It is generally defined as "a change in a contract price that

Request for Equitable Adjustment (REA), Raito sought $6,265,229.25 in compensation above the contracted-for price of $3,305,650 in order to compensate it for the eight issues. See 3d Party App. Ex. 6 (Executive Summary at 24).

Of the eight issues, the first is a claim for steel escalation costs. See Compl. ¶¶ 16-21. Raito claims that due to a delay in receiving tip elevation data from RIDOT necessary before ordering steel casings, the price of steel escalated significantly from the price contemplated in Raito's bid. See id. Raito's steel escalation claims are divided into two parts: Part A seeks additional compensation under R.I. Gen. Laws § 42-13-6.1 (the Steel Escalation Statute) for the steel price index, and Part B seeks additional compensation for alleged delays that prevented Raito from ordering the steel in a more timely fashion. See 3d Party App. Ex. 10 (REA #1). The State in its instant Motion seeks summary judgment only as to Issue One, Part A. Raito claims that under the General Requirements and Covenants of the Standard Specifications for Road and Bridge Construction (Standard Specifications), it is entitled to an equitable adjustment for the additional material costs associated with the State's delay. See Compl. ¶¶ 16-21.

Issue Two is additional costs for extended job site overhead due to a differing site condition at Shaft P 3-2. See id. at ¶¶ 22-26. On June 26, 2004, during the installation of the P 3-2 shaft, Raito encountered a steel sheet pile wall in the river. See id. Raito then worked to remove the sheet pile obstruction from June 30, 2004 to October 14, 2004, incurring approximately three months of project overhead expenses. See id. Cardi and RIDOT compensated Raito for its direct costs to remove the obstruction and granted Raito a three-month

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compensates a contractor for increased costs reasonably incurred because the government increased the amount or difficulty of work required by the contract, whether by formal change order or constructive changes, or delayed or accelerated that work." 64 Am. Jur. 2d Public Works and Contracts § 182 (2012) (citing Morrison Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221, 1243-44 (10th Cir. 1999)); see 6 Philip L. Bruner and Patrick J. O'Connor, Jr., Construction Law § 19:50 (2012).

time extension, but Raito claims it is owed additional compensation for extended job site overhead under the Standard Specifications. See id.

Third, Raito claims additional costs to complete Shaft P 3-2 due to a changed condition at the shaft site. See id. at ¶¶ 27-32. Prior to encountering the buried sheet pile at P 3-2, Raito had completed five shafts in that segment of the Project and claims to have achieved increased work productivity with each shaft. See id. Raito claims the suspension of work to remove the sheet pile obstruction increased its costs. See id. Particularly, Raito claims it incurred additional costs associated with the hiring and training of new craft labor employees after laying off employees during the delay, costs of repairing equipment from the wear and tear caused during removal of the obstruction, and costs from losing productivity due to soil disturbances caused during the obstruction removal. See id. Raito contends the sheet pile constitutes a differing site condition, which allows Raito an adjustment for increased costs under the Standard Specifications. See id.

Issue Four concerns additional costs for working in winter conditions over the water. See id. at ¶¶ 33-36. Originally, the shafts in the Providence River were to be installed beginning in the Spring of 2004, but because of the delays and allegedly differing site conditions, Raito did not begin installation of the marine shafts until the Autumn of 2004. See id. Consequently, Raito was forced to install the shafts during severe winter weather, increasing Raito's costs. See id. Raito claims it is owed compensation for the additional costs for working on the water in the winter months. See id.

The fifth issue is in regard to additional costs for resequencing directed by Cardi and RIDOT. See id. at ¶¶ 37-44. In early January of 2005, Raito began preparing to install Shaft P 2-6 by installing the necessary support grillage. See id. On January 25, 2005, Raito completed installation of the previous shaft in line and began transitioning to the installation of Shaft P 2-6.

See id. On January 26, 2005, Cardi instructed Raito to discontinue work on Shaft P 2-6, later explaining the directive was because nearby ground monitoring instruments were malfunctioning. See id. This disrupted Raito's work and forced them to install new grillage and relocate to a different shaft, incurring additional costs. See id. Raito claims it is entitled compensation for the additional costs. See id.

The sixth issue presented by Raito is additional costs due to a differing site condition or significant change in the character of work because of an increased amount of bedrock present at the site. See id. at ¶¶ 45-51. Raito states that the composition of materials to be drilled was only to be 52% bedrock, but Raito was in fact required to drill through 220% more bedrock than represented in the contract documents. See id. Raito characterizes the increased amount of bedrock as a differing site condition and/or significant change in the character of work. See id. Because drilling through bedrock is more costly and time consuming, Raito claims it is entitled to an adjustment for the extra costs caused by the increased quantities of bedrock. See id.

Issue Seven concerns additional costs to accelerate and complete construction of the West Abutment Shafts. See id. at ¶¶ 52-56. Due to delays on other shafts, Raito mobilized a second drill operation, allegedly incurring significant additional costs. See id. This claim presented as Issue Seven is not a subject of the State's instant Motion for Partial Summary Judgment.

The final issue, Issue Eight, relates to additional costs due to allegedly excessive repair demands by the State at Shaft P 2-3. See id. at ¶¶ 57-69. In August of 2005, concrete anomalies were discovered in Shaft P 2-3. See id. Raito retained an engineering firm and proposed a repair method that Raito claims RIDOT rejected on September 20, 2005. See id. Rather than the original proposed remedy, Raito engaged a firm to hydro-demolish the top sixty-feet of concrete to redo the work. See id. However, the hydro-demolition method failed, and Raito re-proposed

the original method to RIDOT. See id. RIDOT instead required Raito to remove and replace zones of concrete, including some concrete that conformed to the contract requirements. See id. Raito contends this procedure constituted economic waste because the costs and burdens associated with it were grossly disproportionate to the benefit it provided, and less costly, satisfactory alternative methods were available. See id.

On May 19, 2007, following receipt of the bundled REA, the State notified Raito that a panel would review the request and make a preliminary determination by the end of August of 2007. (3d Party App. Ex. 18 (Ltr. from RIDOT to Cardi, May 16, 2007).) Nevertheless, on June 26, 2007, approximately three months after filing the REA including the eight issues, Raito filed the instant civil action against Cardi. (3d Party Compl. ¶ 15.) In its Complaint, Raito set forth counts for breach of contract, breach of the implied covenant of good faith and fair dealing, breach of warranty, negligent misrepresentation, quantum meruit, and a payment bond claim. See Compl. ¶¶ 76-114. The Complaint covers the eight issues set forth in the REA and additionally seeks past due amounts and backcharges. See id. at ¶¶ 70-75. On August 17, 2007, Cardi filed the Third Party Complaint against the State. Cardi claims the State is liable to it for Raito's pass-through claims. The State now moves for partial summary judgment on that complaint.

In March of 2012, Raito submitted a Revised Claim and Payment Reconciliation (Revised REA), containing the same eight issues but modifying the amount of and method of calculating damages. See 3d Party App. Ex. 20 (Revised REA). Raito's total claims were reduced to $4,687,860.57, divided as follows: $341,005.96 for Issue One, steel escalation costs; $194,215.91 for Issue Two, extended job site overhead; $151,334.52 for Issue Three, additional costs to complete Shaft P 3-2; $753,480.93 for Issue Four, additional costs for winter conditions;

$183,165.66 for Issue 5, resequencing at Shaft P 2-6; $937,362.69 for Issue Six, presence of additional bedrock; $672,996.27 for Issue Seven, west abutment costs; and $1,454,298.63 for Issue Eight, excessive repair procedures. Id.

II

Standard of Review

Summary judgment is proper when "no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Rule 56(c)). On consideration of a motion for summary judgment, this Court must draw "all reasonable inferences in the light most favorable to the nonmoving party." Hill v. Nat'l Grid, 11 A.3d 110, 113 (R.I. 2011) (quoting Fiorenzano v. Lima, 982 A.2d 585, 589 (R.I. 2009)). However, the burden lies on the nonmoving party to "prove the existence of a disputed issue of material fact by competent evidence," rather than resting on the pleadings or mere legal opinions and conclusions. Hill, 11 A.3d at 113.

Where it is concluded "that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law," summary judgment shall properly enter. Malinou v. Miriam Hosp., 24 A.3d 497, 508 (R.I. 2011) (quoting Poulin v. Custom Craft, Inc., 996 A.2d 654, 658 (R.I. 2010)); see also Holliston Mills, Inc. v. Citizens Trust Co., 604 A.2d 331, 334 (R.I. 1992) (stating "summary judgment is proper when there is no ambiguity as a matter of law"). Conversely, "if the record evinces a genuine issue of material fact, summary judgment is improper." Shelter Harbor Conservation Soc'y, Inc. v. Rogers, 21 A.3d 337, 343 (R.I. 2011) (citations omitted). "Summary judgment is an extreme remedy that should be

applied cautiously." Hill, 11 A.3d at 113 (quoting Plainfield Pike Gas & Convenience, LLC v. 1889 Plainfield Pike Realty Corp., 994 A.2d 54, 57 (R.I. 2010)).

III

Discussion

The State moves for partial summary judgment on six of the eight issues described above. The Court will address each issue in turn.

A

Issue One, Part A

Steel Escalation Statute Adjustment

As its Issue One, Part A claim, Raito seeks to recover from the State pursuant to the Steel Escalation Statute for the increased cost of steel used in the project. On summary judgment, the State argues that Raito's steel cost claims are barred by the doctrines of laches and equitable estoppel. The State claims that Raito has delayed unreasonably in revising its steel costs calculations, prejudicing the State, and that the State relied on Raito's September 2005 steel cost claim to its detriment. Raito counters that the State has failed to support the application of either doctrine.

Previously, on September 16, 2005, Raito submitted to Cardi a request for additional compensation under the Steel Escalation Statute, and Cardi forwarded that request to the State on September 20, 2005. See 3d Party App. Ex. 23 (Ltr. from Cardi to RIDOT, Sept. 20, 2005). Raito sought $215,022.95 under its Issue One, Part A request at that time. See id. On November 15, 2006, the State approved payment to Raito under the Steel Escalation Statute for $185,015.32, which represented the full amount of Raito's claim, minus $30,007.64 that Raito sought "for profit, bond, or profits on the bond because compensation of that nature is

specifically excluded from the Steel Escalation Statute." (3d Party App. Ex. 36 (Robert Ferrara Aff. ¶ 10, Mar. 30, 2012).)

The $185,000 amount due to Raito, according to the State, was paid to Cardi in November of 2006. See 3d Party App. Ex. 25 (Report of Change). Still, Raito requested that amount in its March 2007 REA and in its June 2007 Complaint in the present litigation. Raito claims the $185,000 payment to Cardi was not disclosed to Raito until discovery in this matter. See Mem. of Law in Supp. of Raito, Inc.'s Opp'n to 3d Party Def.'s Mot. for Partial Summ. J. (Pl.'s Mem.) Ex. D (Ryan McTigue Aff. ¶ 6, May 7, 2012).

In its March 2012 Revised REA, Raito discounted its steel costs claim by the $185,000 amount paid, but claimed an additional owed amount of $141,376.67. (3d Party App. Ex. 10 (REA #1).) Raito claims the new amount is the result of a prior miscalculation under the steel escalation formula. See id. at Exs. 10 (REA #1), 26 (Ryan McTigue Dep. Vol. 2, 179:24-181:2). Raito claims it is entitled to the $141,000 beyond the already-paid $185,000 to compensate it fully for its Issue One, Part A steel escalation costs. The State, however, argues Raito's claims should be barred by laches and equitable estoppel.

The Rhode Island Steel Escalation Statute, codified at § 42-13-6.1, authorizes RIDOT to ". . . adjust for changes in the unit prices for steel required in order to complete performance of highway and bridge construction contracts . . . ." Particularly, it provides that contractors will be compensated for the difference between the cost of steel on the date bids were opened and the cost of steel on the date of purchase, with no allowance for overhead or profit. Sec. 42-13-6.1(b). Section 938 of the Standard Specifications provides the precise formulas to be used in steel price adjustments pursuant to the Steel Escalation Statute. See 3d Party App. Ex. 22 (Ltr. from RIDOT, Apr. 25, 2005). Using what it now (as of March 2012) avers are the appropriate

formulas, Raito seeks payment under the Steel Escalation Statute beyond what it already received from the State in response to its September 2005 request.

"Laches is an equitable defense that precludes a lawsuit by a plaintiff who has negligently sat on his or her rights to the detriment of a defendant." Hazard v. East Hills, Inc., 45 A.3d 1262, 1269 (R.I. 2012) (quoting O'Reilly v. Town of Glocester, 621 A.2d 697, 702 (R.I. 1993)). Thus, laches "is not mere delay, but delay that works a disadvantage to another." Chase v. Chase, 20 R.I. 202, 203-04, 37 A. 804, 805 (1897) (providing court must find negligence by plaintiff and injury to defendant); see Adam v. Adam, 624 A.2d 1093, 1096 (R.I. 1993) ("Mere delay alone is not enough, the delay must be unreasonable"). To invoke laches, "[f]irst, there must be negligence on the part of the plaintiff that leads to a delay in the prosecution of the case. * * * Second, this delay must prejudice the defendant." Sch. Comm. of Cranston v. Bergin-Andrews, 984 A.2d 629, 644 (R.I. 2009) (quoting O'Reilly, 621 A.2d at 702).

As an equitable affirmative defense, laches' applicability "rests within the sound discretion of the trial justice." Hazard, 45 A.3d at 1270 (citing Andrukiewicz v. Andrukiewicz, 860 A.2d 235, 241 (R.I. 2004)). While what constitutes laches is ordinarily a question of fact, the Rhode Island Supreme Court has not excluded the possibility of granting summary judgment on the ground of laches. Raso v. Wall, 884 A.2d 391, 396 n.13 (R.I. 2005); see Fitzgerald v. O'Connell, 120 R.I. 240, 245, 386 A.2d 1384, 1387 (1978) (describing it as question of fact). In fact, our highest court even more recently affirmed summary judgment based on the doctrine of laches, finding no error in trial justice's determination that the defendant proved laches "as a matter of law." Hazard, 45 A.3d at 1269-71. However, the facts in Hazard presented an extreme example of delay and prejudice. See id. at 1264-71 (stating court would be "hard-pressed to

conceive of a clearer example of the proper application of laches than in the case before [it], in which a party delays bringing a claim for more than a century").

"Lapse of time, of itself, is an important but not a necessarily controlling element in the determination of the question of laches." Blackstone Valley Gas & Elec. Co. v. R.I. Power Transmission Co., 64 R.I. 204, 12 A.2d 739, 754 (1940). Unreasonable delay and prejudice to the defendant is required, and what constitutes prejudice depends on the particular circumstances of each case. Pukas v. Pukas, 104 R.I. 542, 547, 247 A.2d 427, 429 (1968). In considering the prejudicial disadvantage, "what is crucial are the changes brought about by the passage of time." Berthiaume v. Sch. Comm. of Woonsocket, 121 R.I. 243, 250, 397 A.2d 889, 894 (1979); see Chase, 37 A. at 805 (explaining no disadvantage "so long as parties are in the same condition," but disadvantage when "other party has, in good faith, become so changed that he cannot be restored to his former state"). Typically, courts consider whether the delay will "render it difficult or impossible for the court to ascertain the truth of the matters in controversy and do justice between the parties." Fitzgerald, 120 R.I. at 246, 386 A.2d at 1387. However, "there is no hard and fast rule for determining what constitutes sufficient prejudice to invoke the doctrine of laches." Id. at 248, 386 A.2d at 1389.

Here, it is undisputed that Raito submitted a request in September of 2005 and received an adjustment in November of 2006 pursuant to the Steel Escalation Statute. It is further without question that Raito performed the work using the steel that is the subject of Raito's claims in 2004 and early 2005. See 3d Party App. Ex. 10 (REA #1). Raito did not revise its steel cost calculation until March of 2012—six and a half years after its first calculation and request to the State. It is arguable that Raito negligently sat on its rights to recover the additional $141,000 it claims it is owed. See Hazard, 45 A.3d at 1269 (explaining elements of laches).

However, the Court is not convinced that a delay of six years (or even eight years from the first date of invoiced steel) before bringing what is alleged to be an appropriate, corrected claim prejudiced the State. See id. (providing second element of laches: prejudicial disadvantage to defendant). The State has not demonstrated any changed condition between the 2005 request and the 2012 revision that would disadvantage the State from considering the claim now. See Berthiaume, 121 R.I. at 250, 397 A.2d at 894 (providing changes over time are crucial to consideration of prejudicial disadvantage). The Court is not persuaded that leaving the State to address Raito's claim in this litigation is prejudicial, as opposed to the State addressing it just several years prior. Further, the Court has not been made aware of any changes over the years that would render it difficult to ascertain the truth of the steel escalation request or to do justice between the parties. See Fitzgerald, 120 R.I. at 246, 386 A.2d at 1387 (considering whether delay would make it difficult to ascertain truth or do justice).

The delay of six or eight years, coupled with only tenuous assertions of prejudice, cannot provide for summary judgment in favor of the State on an issue that is typically a question of fact. See id. at 245, 386 A.2d at 1387 (describing laches as question of fact). But see Hazard, 45 A.3d at 1271 (upholding trial justice's finding of laches made as matter of law); Raso, 884 A.2d at 396 n.13 (indicating laches could be determined on summary judgment under appropriate facts). Unlike in Hazard—where delay was over one hundred years and evidence and witnesses were no longer available—in this case, the delay is not so unreasonable and the prejudice is not so clear as to justify granting summary judgment in favor of the State on the basis of the doctrine of laches. Cf. 45 A.3d at 1270-72.

The State also argues that Raito should be equitably estopped from seeking the additional costs under the Steel Escalation Statute. In general, equitable estoppel requires "first, an

affirmative representation or equivalent conduct on the part of the person against whom the estoppel is claimed which is directed to another person for the purpose of inducing the other to act or fail to act in reliance thereon; and secondly, that such representation or conduct in fact did induce the other to act or fail to act to his injury." Providence Teachers Union v. Providence Sch. Bd., 689 A.2d 388, 391-92 (R.I. 1997). The "key element of an estoppel is intentionally induced prejudicial reliance." El Marocco Club, Inc. v. Richardson, 746 A.2d 1228, 1234 (R.I. 2000).

As with the laches analysis, the Court here cannot find prejudice sufficient to grant summary judgment in favor of the State on equitable estoppel grounds. There is no evidence Raito submitted the September 2005 request with the intent of causing the State to rely on incorrect calculations to the State's detriment. See El Marocco Club, 746 A.2d at 1234 (requiring intentionally induced prejudicial reliance). Further, there is no evidence the State relied on that request to its detriment. Appropriately adjusting the amount due to Raito now is not any more injurious to the State than if Raito had first brought its request using the current calculations.

Raito proffers that its revised claim more accurately complies with the Steel Escalation Statute and the Standard Specifications, providing Raito with the amount it is allegedly owed by law. Holding Raito to the allegedly incorrect amount it originally claimed would do injustice and frustrate compliance with the law. To be sure, such a result is not the end intended by the doctrine of equitable estoppel. See Greenwich Bay Yacht Basin Assocs. v. Brown, 537 A.2d 988, 991 (R.I. 1988) (explaining equitable estoppel applies when "principles of equity so require" but "will not be applied unless the equities clearly must be balanced in favor of the parties seeking relief under this doctrine"). Here, a balance of the equities may be more properly

achieved by permitting Raito to pursue the amount it claims it is owed under law and the applicable specifications.

Accordingly, the Court denies the State's Motion for Summary Judgment as to Issue One, Part A. The Court does not find, at this juncture, that the doctrines of laches or equitable estoppel bar Raito's claims under the Steel Escalation Statute.

B

Issue Two

Additional Costs for Claimed Job Site Overhead due to Allegedly Differing Site Condition for Removal of Buried Sheet Pile Wall at Shaft P 3-2

Under Issue Two, Raito claims additional costs for alleged job site overhead to remove a buried sheet pile wall at Shaft P 3-2. In June of 2004, Raito encountered a buried sheet pile wall during the installation of that shaft. (Compl. ¶¶ 22.) It took Raito roughly four months to remove the buried sheet pile at the location. See 3d Party App. Ex. 27 (Report of Change). Raito was then able to resume installation of the shaft in October of 2004. See 3d Party App. Ex. 11 (REA #2).

The State issued Raito a change order in April of 2005, of which $1,099,797.03 was to compensate Raito for its direct costs incurred in removing this sheet pile obstruction at Shaft P 3-2. See 3d Party App. Exs. 11 (REA #2), 28 (Facsimile Transmittal Sheet and Report of Change). Later, on October 18, 2005, Raito sent Cardi a request for an equitable adjustment to compensate for extended job site overhead for three months in connection with the obstruction removal.[4] See 3d Party App. Ex. 30 (Ltr. from Raito to Cardi, Oct. 18, 2005). Raito's REA on Issue Two specifically acknowledged that the State had already compensated it for the direct costs incurred

[4] Because the State—apparently in an effort to mitigate the delays—eliminated one of the shafts required by Raito's subcontract, the impact of the sheet pile delay was reduced from four months to three. See 3d Party Appx. Ex. 30 (Ltr. from Raito to Cardi, Oct. 18, 2005).

and requested an equitable adjustment of $194,215.91 "to compensate Raito for the indirect costs it incurred to remove the steel sheet piling obstruction . . . ." (3d Party App. Ex. 11 (REA #2).) Throughout its calculations and supporting backups, Raito classifies the costs it seeks in Issue Two as indirect. See 3d Party App. Exs. 11 (REA #2), 31 (Indirect Cost Backup).

Thus, the State argues that Raito's requests concern unrecoverable indirect costs and fail to account for Raito's own labor inefficiencies on the Project. Employees of Raito indicated that labor was at least less efficient than anticipated. See 3d Party App. Exs. 7 (John Roma Dep. 16:2-14, Nov. 9, 2011), 33 (Michael Carey Diary). Conversely, Raito claims that regardless of how it internally classified the costs, the job site and field office overhead constitutes recoverable, direct costs under the contract. Raito further disputes the characterization of its claims as the result of labor inefficiency.

The Standard Specifications govern what costs are compensable in the event of project delays. See 3d Party App. Ex. 34 (Standard Specifications § 109.10). The applicable section provides:

> "Only the additional costs associated with the following items will be recoverable by the Contractor as an equitable adjustment for delays.
>
> 1. Non-salaried labor expenses.
> 2. Costs for materials.
> 3. Equipment costs.
> 4. **Costs of extended job-site overhead**.
> 5. An additional surcharge of 10 percent of the total of items 1, 2, 3, and 4, to account for home office overhead and profit." Id. at § 109.10(b) (emphasis added).

The section limits the State's liability for other delay costs as follows:

> " . . . the Department will have no liability for the following items of damages or expense:
>
> 1. Profit in excess of that provided herein;
> 2. Loss of profit;
> 3. **Labor inefficiencies**;

> 4. **Home office overhead** in excess of that provided herein;
> 5. Consequential damages, including but not limited to loss of bonding capacity, loss of bidding opportunities and insolvency;
> 6. **Indirect costs** or expenses of any nature;
> 7. Attorneys fees, claims preparation expenses or costs of litigation." Id. at § 109.10(c) (emphasis added).

Accordingly, pursuant to the Standard Specifications, Raito may recover the costs of extended job site overhead caused by project delays, but Raito may not recover for labor inefficiencies or for home office overhead, except for the ten-percent surcharge added to account for home office overhead. See id. at § 109.10.

In support of its argument that Raito is seeking to recover indirect costs, the State relies primarily on Raito's own classification of the costs incurred. The Revised REA lists "Indirect Labor" and "Indirect Other" costs as comprising the ". . . indirect costs it incurred to remove the steel sheet piling obstruction . . . ." (3d Party App. Ex. 11 (REA # 2).) Raito also produced an "Indirect Cost Backup," which is a line-item list of the Indirect Labor and Indirect Other costs. See 3d Party App. Ex. 31 (Indirect Cost Backup). The claimed costs include such things as travel expenses, office supplies, equipment rental, phone and utilities, safety supplies, dining and entertainment, and employee salaries. See id. at Exs. 31 (Indirect Cost Backup), 32 (Forecast (providing Raito cost codes for indirect cost categories listed in the backup)). Despite its classification of the costs as indirect, the same Revised REA lists Issue Two as requesting "Extended Jobsite Overhead." (3d Party App. Ex. 11 (REA # 2).)

Additionally, the State cites some authority in other jurisdictions indicating that indirect costs include costs of utilities, phones, and office supplies. See, e.g., West v. All State Boiler, Inc., 146 F.3d 1368, 1372 (Fed. Cir. 1998) ("indirect costs which are not attributable to one contract in particular but arise because of its general operations. Indirect costs are usually those

costs that are 'incurred despite construction inactivity on a project, such as home office overhead including accounting and payroll services, general insurance, salaries of upper level management, heat, electricity, taxes, depreciation."); Overstreet Elec. Co. v. United States, 47 Fed. Cl. 728, 740 (Fed. Cl. 2000) ("'Indirect labor costs' are wages paid to contractor personnel whose effort cannot be attributed to a specific construction task. Personnel such as superintendents, engineers, clerks, and site cleanup laborers may be included as indirect costs."); Complete Gen. Constr. Co. v. Ohio Dep't of Transp., 760 N.E.2d 364, 368 (Ohio 2002) ("indirect costs, are the expenses involved in generally running a business, not attributable to any one project . . . . Such costs typically include salaries of executive or administrative personnel, general insurance, rent, utilities, telephone, depreciation, professional fees, legal and accounting expenses, advertising, and interest on loans."). However, this Court does not deem those cases dispositive as to the present matter and notes that their reasoning and holdings are not necessarily applicable.

Raito, in response, emphasizes the difference between field office or job site overhead and home office overhead. Under the Standard Specifications, job site overhead is recoverable, while home office overhead is not. See 3d Party App. Ex. 34 (Standard Specifications § 109.10). Raito further cites cases for the proposition that "home office overhead is an indirect cost whereas field office overhead is a direct cost." George Sollitt Constr. Co. v. United States, 64 Fed. Cl. 229, 242 n.10 (Fed. Cl. 2005) (describing field office overhead as "costs that are increased due to maintaining a presence at the construction site for a longer period than originally anticipated in the bid"); see Williams Enters., Inc. v. Strait Mfg. & Welding, Inc., 728 F. Supp. 12, 19 (D.D.C. 1990) (stating costs for remaining onsite, including "required on-site management, temporary electricity, telephones, trailer, clean-up, and other regular construction

project needs" are compensable as field office overhead); Ace Constructors, Inc. v. United States, 70 Fed. Cl. 253, 279 (Fed. Cl. 2006) ("Field overhead is described as 'administrative costs to run a project, such things as [a] superintendent, quality control, vehicles associated with those people, clerical staff, [and] office supplies.' . . . Field overhead is a generally recoverable item in the construction industry."). Additionally, Raito offers testimony by way of an affidavit affirming that the Issue Two claims are "costs pertaining to onsite management, the construction trailer, utilities, lodging, food, fuel, and other administrative costs for the jobsite." (Pl.'s Mem. Ex. D (McTigue Aff. ¶ 8).) The affiant further states, "Issue 2 does not include any costs associated with Raito's home office or any other projects besides the Providence River Bridge." Id. at ¶ 9.

A review of the cost backups and a reading of the McTigue Affidavit provide genuine disputes of fact rebutting the State's position that Raito is seeking unrecoverable indirect costs. See Smiler, 911 A.2d at 1038 (providing summary judgment proper only when no genuine dispute of material fact evident). Raito's internal classification of the costs as indirect does not necessarily render them indirect under the terms of the controlling contractual documents. Whether the costs sought by Raito are in fact direct (and recoverable) or indirect (and unrecoverable) is a question of fact reserved for the fact finder. See Shelter Harbor Conservation Soc'y, 21 A.3d at 343 (providing summary judgment improper when genuine issue of fact). Judged in the light most favorable to the nonmoving party, Raito, summary judgment is precluded by a genuine dispute of material fact. See Hill, 11 A.3d at 113. As such, the Court denies the State's Motion for Summary Judgment as to Issue Two.

C

Issue Three

Additional Costs to Complete Shaft P 3-2 due to Alleged Differing Site Condition or Change in Character of Work

In its Issue Three claim, Raito seeks to recover the additional costs to complete Shaft P 3-2 during October of 2004, following the removal of the sheet pile obstruction. However, the State received no notice of Raito's claims on Issue Three until the March 2007 REA. (3d Party App. Ex. 36 (Ferrara Aff. ¶ 17).) The compensation sought relates to the delays caused by the buried sheet pile, but the damages were not tracked or calculated by Raito until it prepared the March 2007 REA. (3d Party App. Ex. 26 (Ryan McTigue Dep. Vol. 2, 185:4-186:10).)

The State claims Raito's request is really for labor inefficiencies, recovery of which is barred by the Standard Specifications § 109.10(c)(3). That section provides that the State is not liable for labor inefficiency expenses in connection with project delays. See 3d Party App. Ex. 34 (Standard Specifications § 109.10(c)). Raito, on the other hand, argues it is seeking compensation for costs associated with differing site conditions or substantial changes in the character of the work—not labor inefficiency delay costs.

Regarding differing site conditions, the Standard Specifications provide:

> "During the progress of the work, if **subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the Contract** or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the Contract, are encountered at the site, the party discovering such conditions shall **promptly notify the other party in writing of the specific differing conditions before the site is disturbed and before the affected work is performed**.
>
> "Upon written notification, the Engineer will investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required

> for the performance of any work under the Contract, an adjustment, excluding anticipated profits, will be made and the Contract modified in writing accordingly. The Engineer will notify the Contractor of the determination whether or not an adjustment of the Contract is warranted.
>
> "**No Contract adjustment which results in a benefit to the Contractor will be allowed unless the Contractor has provided the required written notice**.
>
> "No Contract adjustment will be allowed under this clause for any effects caused on unchanged work." (3d Party App. Ex. 34 (Standard Specifications § 104.03) (emphasis added).)

As to a significant change in the character of the work, the Standard Specifications provide that the State Engineer may make "changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project." (Pl.'s Mem. Ex. I (Standard Specifications § 104.07).) The section explains:

> "If the **alterations or changes in quantities significantly change the character of the work** under the Contract, whether such alterations or changes are in themselves significant changes to the character of the work or by affecting other work cause such other work to become significantly different in character, an adjustment, excluding anticipated profits, will be made to the Contract." Id. (emphasis added).

However, the section clearly refers only to changes in quantities and alterations to the work as made and directed by the State Engineer. See id. Thus, the provision for cost adjustments for significant changes in the character of the work applies to compensate the contractor only for changes made by the State within its reservation of right to make changes during the work on the Project. See id.

If the incurred costs are the result of a differing site condition or a significant change in the character of the work, recovery by the contractor is governed by Standard Specifications § 109.04. That section provides the framework for recoverable costs and does not include the

same "labor inefficiency" exclusion as in § 109.10, which applies to compensation for project delays. It appears labor costs (including inefficiencies) are recoverable under § 109.04. See Pl.'s Mem. Ex. I (Standard Specifications § 109.04).

It is clear to the Court that Raito's Issue Three claims are not related to a significant change in the character of the work, as provided by Standard Specification § 104.07. The provision for compensation for significant changes in the character of the work applies only to changes and alterations made by the State in its direction of Raito's work. See Pl.'s Mem. Ex. I (Standard Specification § 104.07). Here, a buried sheet pile wall was discovered at the site, Raito was forced to remove the sheet pile wall, and Raito allegedly incurred additional costs to complete the shaft after the removal. There is no evidence that the State made changes in the quantities of the work or that the State made alterations to the work plans. See id. (discussing significant changes in the character of the work when "The Engineer . . . make[s] . . . changes in the quantities and such alterations in the work . . ."). Raito's Issue Three cost claims cannot be the result of a significant change in the character of the work because the changes were not directed by the State.

The Court will not address here whether Raito's Issue Three claims are the result of a differing site condition or are general delay costs. Even if Raito's claims were the result of differing site conditions, the State argues that recovery is barred because of Raito's failure to provide notice to the State as required by the Standard Specifications.

For all claims for adjustments for additional compensation, the contract provides:

> "If the Contractor deems that additional compensation is due for work or material not clearly covered in the Contract, the Contractor shall **notify** both the Engineer and the Chief of Construction Operations **in writing of its intention to make claim**

> **for such additional compensation before beginning or continuing the affected work**. If such notification is not given, or the Contractor does not afford the Engineer proper facilities for keeping strict account of the actual costs, the Contractor thereby **waives** any claim for additional compen-sation [sic]." (3d Party App. Ex. 34 (Standard Specifications § 105.18(a)) (emphasis added).)

Similarly, for differing site conditions in particular, the contractor must promptly notify the State of the differing site conditions before the site is disturbed and before the work is performed. See id. at § 104.03. After providing the required notice for any delay costs, claims for compensation "must be submitted within 120 days of substantial completion of the project. Claims submitted after 120 days will not be accepted." Id. at § 105.18(b). The Standard Specifications also impose requirements for documentation, certification, and auditing of the claims. See id. at § 105.18.

With respect to project delays that result in additional costs, the Standard Specifications require that "[w]ithin 30 calendar days of any Department action or omission which the Contractor believes has delayed or may delay the project, the Contractor shall notify the Resident Engineer of such a delay and indicate whether it intends to file a request for delay costs." Id. at § 105.20(b). The section explicitly provides that "strict adherence to the provisions of this Subsection is a condition precedent to the Contractor's entitlement to additional compensation or an extension of time because of project delays." Id. at § 105.20(a).

The Rhode Island Supreme Court has enforced Standard Specification provisions that waive a contractor's claim if it does not provide the required timely notice. See R.I. Tpk. & Bridge Auth. v. Bethlehem Steel Corp., 119 R.I. 141, 161-62, 379 A.2d 344, 355 (1977). But see Clark-Fitzpatrick, Inc. v. Gill, 652 A.2d 440, 447 (R.I. 1994) (cautioning that form should not be made superior to substance and finding in that case that failure to give formal notice did not

waive contractor's claim). Our highest court has explained that the purpose of the Standard Specification notice provisions is "to ensure that an owner has the opportunity to examine the work at issue and to monitor the performance and costs of repair and/or extra work." Clark-Fitzpatrick, 652 A.2d at 447.

In this case, Raito resumed installation of shaft on October 16, 2004 and completed the shaft on October 28, 2004. See 3d Party App. Ex. 12 (REA # 3). For any additional costs, Raito was required to provide notice to the State that it would be seeking additional compensation before performing or continuing the affected work. See 3d Party App. Ex. 34 (Standard Specifications §§ 104.03 (requiring contractor "promptly notify the other party in writing of the specific differing conditions before the site is disturbed and before the affected work is performed"), 105.18(a) (requiring contractor "notify [State] in writing of its intention to make claim for such additional compensation before beginning or continuing the affected work")). For delay costs, Raito was required to notify the State within thirty days of the event causing the delay and to bring a claim within 120 days of completing the work. See id. at § 105.20. The Court finds no genuine dispute that Raito did not provide the requisite notice to recover costs of completing the shaft installation.

Raito, arguing that it provided notice of the additional costs to complete Shaft P 3-2, relies on a July 1, 2004 letter to the State. See Pl.'s Mem. Ex. N (Ltr. from Cardi to State). That letter, however, states only that Raito "will submit a change order for the costs associated with the removal of this obstruction," referring to the buried sheet pile wall at Shaft P 3-2. See id. There is no dispute that this communication provided notice Raito would seek additional costs for removal of the sheet pile obstruction, which is Raito's Issue Two claim. However, this letter did not provide notice that Raito would seek additional compensation for the completion of the

shaft after removal of the obstruction. Despite Raito's argument, it cannot rely on its notice of Issue Two to provide notice of the separate, successive costs to later complete the shaft, brought as Issue Three.

By the contractual terms, Raito's claims under Issue Three are barred for lack of notice. Raito provided no sufficient notice of its Issue Three claim until March 2007, when it submitted its REA. Thus, Raito clearly failed to notify the State within the periods set forth in the Standard Specifications—whether the 30-day period applies or the requirement of notice before continuing work applies. For good reason, the Standard Specifications provide that "[n]o contract adjustment . . . will be allowed unless the Contractor has provided the required written notice," see § 104.03, that "[i]f such notification is not given . . . the Contractor thereby waives any claims for additional compen-sation," see § 105.18(a), and that "strict adherence to the [notice] provisions . . . is a condition precedent to the Contractor's entitlement to additional compensation," see § 105.20(a). Raito's failure to notify denied the State the opportunity to confirm the site conditions, to monitor the additional work, or to readjust the work plans to mitigate additional costs. See Clark-Fitzpatrick, 652 A.2d at 447 (providing purpose behind notice requirements). Even if the State were aware of the delays and the site conditions, it was not aware Raito would be seeking additional costs on Issue Three for completion of the shaft. Lack of proper notice bars Raito's claims on Issue Three. See Bethlehem Steel, 119 R.I. at 161-62, 379 A.2d at 355 (upholding waiver of claim due to lack of notice).

Lastly, because the State instructed Raito to bundle its equitable adjustment claims, Raito argues that the State waived the contract notice requirements. A Standard Specification provision, however, limits waiver of legal rights under the contract. See 3d Party Def.'s Reply to Pl's Opp'n (3d Party Reply) Ex. 7 (Standard Specifications § 107.16). Specifically, the

provision states, "A waiver on the part of the Department of any breach of any part of the Contract shall not be held to be a waiver of any other or subsequent breach." Id. The State argues this provision allows the State to waive notice with regard to some issues without waiving the notice requirements for other claims. This Court finds that the State's instruction in November of 2005 to bundle claims cannot be found to waive the requirements that Raito notify the State a year before that date, as the work was performed in October of 2004 and notice, if not due before proceeding, was due in November of 2004. See Pl.'s Mem. Ex. O (Ltr. from State to Cardi, Nov. 14, 2005).

The Court, therefore, grants the State's Motion for Summary Judgment as to Issue Three. It is apparent as a matter of law that Raito failed to comply with the notice provisions of the Standard Specifications, precluding Raito from receiving additional compensation.

D

Issue Four

Additional Costs for Working in Winter Conditions Over Water

As with Issue Three, the State received no notice of Raito's claims on Issue Four until the March 2007 REA, and Raito had not tracked or calculated the damages it now seeks until it began preparing the March 2007 REA. See 3d Party App. Exs. 26 (McTigue Dep. Vol. 2, 185:4-186:10), 36 (Ferrara Aff. ¶ 17). The State argues (just as with Issue Three) that it was not provided sufficient notice and that Raito is seeking labor inefficiency costs unrecoverable under the Standard Specifications. Raito, to the contrary, contends the winter conditions constitute a differing site condition, permitting its recovery of additional costs, and that the State was on notice of the delay in schedule.

Regardless of whether the State was on notice of general delays in the project, there is no evidence the State was properly put on notice that Raito would be seeking to recover costs for working in winter conditions. As discussed supra part III(C), Raito was required to provide notice to the State that it would be seeking additional compensation before performing or continuing the affected work. See 3d Party App. Ex. 34 (Standard Specifications §§ 104.03, 105.18(a)). For delay costs, Raito was required to notify the State within thirty days of the event causing the delay and to bring a claim within 120 days of completing the work. See id. at § 105.20. Raito has failed to set forth any competent evidence to dispute the fact that it did not provide the requisite notice with respect to additional costs claims for working in winter conditions. See Hill, 11 A.3d at 113 (stating burden on nonmoving party to prove existence of disputed issue of material fact by competent evidence).

Raito cites to three letters mentioning winter conditions as evidence of Raito's notice of its claim to the State. See Pl.'s Mem. Ex. R. Upon review of those letters, the Court is not satisfied that they provide any notice that Raito will seek additional compensation because of the winter work. Rather, the letters only hint that winter is the worst time of the year to work on the water and that there will be shaft work in the winter months and winter conditions. See id. Mentioning that work will be performed in difficult conditions in the winter does not comply with the notice requirements of the Standard Specifications.

Further, all of these letters (the earliest of which is dated February 18, 2005) were sent after Raito began winter work on the water shafts. Raito began the marine shaft installation on November 15, 2004. See 3d Party App. Ex. 13 (REA #4). By that date, Raito was aware of the acts giving rise to the alleged delay, and therefore had thirty days to provide notice to the State if it would be requesting delay costs. See 3d Party App. Ex. 34 (Standard Specifications

§ 105.20(b)). The first of the letters purporting to give notice simply by mentioning winter work was not sent until February 18, 2005, well beyond the thirty-day window.

Due to the lack of notice of Raito's intention to seek compensation for additional costs to work in winter conditions, this Court need not address whether the costs are compensable or the result of labor inefficiencies. Failure to comply with the notice requirements of the Standard Specifications waives Raito's right to recover any alleged additional costs. See 3d Party App. Ex. 34 (Standard Specifications §§ 104.03, 105.18(a), 105.20(a)-(b)). Therefore, as with Issue Three, the Court grants the State's Motion for Summary Judgment on Issue Four.

E

Issue Five

Additional Costs for Resequencing Because of Sewer Siphon Monitoring Equipment

For Issue Five, Raito seeks to recover additional costs incurred as a result of the resequencing of work from Shaft P 2-6. In January of 2005, the State ordered resequencing of the work around the shaft site because of malfunctioning ground movement monitoring equipment. See 3d Party App. Ex. 6 at 13. The India Street Sewer Siphon, a forty-eight inch brick sewer conduit constructed in 1895, carries sewage and drainage under the Providence River near the Project construction area. See 3d Party App. Ex. 4 (Job Specific Specifications (Job Specifications)). The sewage siphon is located approximately forty-four feet from some drilling locations, including the site of Shaft P 2-6, and that proximity presented significant concerns that ground movement could damage the siphon and result in an environmental disaster. See 3d Party App. Exs. 8 (Shaft Plan), 36 (Ferrara Aff. ¶¶ 20-21). With the monitoring equipment malfunctioning, the ground vibration could not be observed to ensure the integrity of the sewer siphon during drilling. See 3d Party App. Ex. 36 (Ferrara Aff. ¶ 21).

The Job Specifications provided that the ground response during drilling must be monitored and that the "Contractor shall take all necessary precautions and shall alter installation procedures as directed by the Engineer to ensure that no damage occurs to the Hurricane Barrier or the Siphon, at no additional cost to the State." (3d Party App. Ex. 4 (Job Specific Specifications).) The Job Specifications in fact emphasize throughout a number of provisions the necessary ground monitoring procedures during drilled shaft installations in order to ensure protection of the sewer siphon. See id. Furthermore, the Standard Specifications provide the State with:

> "the authority to suspend the work completely or in part due to the failure of the Contractor to correct conditions unsafe for the workers or the general public; for failure to carry out provisions of the Contract; for failure to carry out orders; for such periods necessary due to unsuitable weather; for failure to correct damages to public or private properties caused by the Contractor and/or its subcontractors, for conditions considered unsuitable for the prosecution of the work or for any other condition or reason determined to be in the State's interest." (3d Party App. Ex. 34 (Standard Specifications § 105.01).)

The contract indisputably provides the State with authority to resequence work at no additional cost to the State to ensure that no damage occurs to the sewer siphon.

Raito acknowledges the State's authority to resequence the project, particularly because of ground monitoring around the sewer siphon, but argues that the State acted in a dilatory manner and in bad faith. (Pl.'s Mem. 41.) Raito claims the State knew of the monitoring equipment malfunction but permitted Raito to set up grillage at the shaft site before instructing it to resequence, causing Raito damages and violating the implied covenant of good faith and fair dealing.[5]

[5] The State argues Raito's Complaint does not claim the resequencing breached the covenant of good faith and fair dealing. However, the Complaint includes a Count for breach of the implied

This State recognizes an implied covenant of good faith and fair dealing in virtually every contract. See Dovenmuehle Mortg., Inc. v. Antonelli, 790 A.2d 1113, 1115 (R.I. 2002); Ide Farm & Stable, Inc. v. Cardi, 110 R.I. 735, 739, 297 A.2d 643, 645 (1972). In considering whether a party has breached the covenant, courts weigh "whether or not the actions in question are free from arbitrary or unreasonable conduct." Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 66 F. Supp. 2d 317, 329 (D.R.I. 1999). Such a determination is typically a question of fact. See Ide Farm & Stable, 110 R.I. at 739, 297 A.2d at 645 (noting questions of breach of implied covenant of good faith and fair dealing often present trier of fact with task of picking and choosing which testimony to believe); Thompson Trading, Ltd. v. Allied Breweries Overseas Trading Ltd., 748 F. Supp. 936, 942 (D.R.I. 1990) (stating a jury question exists whether party's conduct was reasonable or violated implied duties of good faith and fair dealing).

Here, in opposition to the State's motion for summary judgment, Raito presents evidence that the State was aware of the monitoring equipment malfunction well before it instructed Raito to resequence. Deposition testimony of James Caroselli indicates that the State waited "a good month or so, maybe two," after discovering that the monitoring equipment was not working to direct Raito to resequence. (Pl.'s Mem. Ex. S (James Caroselli Dep. 30:10-15, Dec. 2, 2010).) Data from the equipment suggests that it malfunctioned as of December 29, 2004. See id. at Ex. T. The State ordered the resequencing on or about January 26, 2005. See id. at Ex. X (Ltr. from

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covenant of good faith and fair dealing, and while that Count does not explicitly refer to the directed resequencing, it does incorporate by reference the facts and allegations relating to Issue Five and does allege violation of good faith and fair dealing by not paying due amounts and not equitably adjusting the contract. See Compl. ¶¶ 37-44, 82-87. The Complaint does not directly correlate the various, distinguishable issues with the Counts. This Court is satisfied, though, that the Count for good faith and fair dealing concerns Issue Five, among others. Furthermore, the Court may grant or deny summary judgment as to claims or issues in a case and is not limited to ruling on summary judgment as to full Counts. See Super. R. Civ. P. 56(a) ("A party seeking to recover upon a claim, counterclaim, or cross-claim . . . may . . . move . . . for a summary judgment in the party's favor upon all or any part thereof.").

Raito to Cardi confirming directive). Other State deponents acknowledged that Raito was not instructed to resequence until the drilling operation was ready to begin at Shaft P 2-6. See id. at Ex. Y (Paul Grimaldi Dep. 146:20-147:11, Nov. 17, 2010; Robert Ferrara Dep. 134:14-24, June 9, 2011). Meanwhile, Raito had expended significant effort and expense to assemble and prepare the drilling site. Raito argues this delay in resequencing demonstrates the State's violation of the implied covenant of good faith and fair dealing and precludes a ruling by this Court on summary judgment in favor of the State on Issue Five.

The Court agrees that there are genuine disputes of material fact whether the State acted reasonably in its conduct ordering resequencing because of the sewer siphon monitoring equipment malfunction. Although it is clear that Raito was obliged to resequence the work as directed by the State and without additional cost to the State in order to protect the integrity of the sewer siphon, Raito has set forth competent evidence to create a genuine dispute whether the State acted reasonably and in good faith. See 3d Party App. Exs. 4 (Job Specific Specifications), 34 (Standard Specifications § 105.01); see also Hill, 11 A.3d at 113 (discussing summary judgment standard). If, as argued by Raito, the State was aware of the malfunction but continued to allow Raito to assemble at the site at significant cost and without adequate reason, the State may have violated the implied covenant of good faith and fair dealing between the contractual parties. There are disputes of material fact whether the State acted free from unreasonable or arbitrary conduct. See Ross-Simons of Warwick, 66 F. Supp. 2d at 329 (providing standard for violation of good faith and fair dealing). As such, the Court cannot grant summary judgment in favor of the State on Issue Five.

F

Issue Six

Additional Costs due to Allegedly Differing Site Condition or Significant Change in Character of Work because of Increased Amounts of Bedrock

In Issue Six, Raito seeks additional costs because of an increased amount of bedrock present at the site of a number of the drilled shafts. Between April of 2004 and August of 2005, Raito drilled shafts at Piers 1, 2, and 3 and encountered what it later claimed to be a differing site condition because of the presence of more bedrock than it had anticipated. See 3d Party App. Ex. 6. Raito had relied on the estimated quantities of subsurface materials as set forth in the contract Plan Sheets. See 3d Party App. Exs. 26 (McTigue Dep. Vol. 2, 190:11-191:10), 37 (Plan Sheets); Pl.'s Mem. Ex. D (McTigue Aff. ¶ 7 ("Raito formed its expectations and created its bid in 2003 based on the [Plan Sheets]")).

Raito argues the additional bedrock constitutes a differing site condition and/or a significant change in the character of work. See 3d Party App. Ex. 15 (REA # 6). As discussed supra part III(C), a differing site condition arises when "subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the Contract . . . ." (3d Party App. Ex. 34 (Standard Specifications § 104.03).) A significant change in the character of work occurs when the State orders "changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project." (Pl.'s Mem. Ex. I (Standard Specifications § 104.07).)

Here, Raito's allegation that the presence of an increased amount of bedrock represents a significant change in the character of the work cannot stand. In light of this Court's interpretation of the Standard Specifications discussed supra part III(C), a contractor's recovery for costs caused by a significant change in the character of the work is limited to significant

changes made by the State. See Pl.'s Mem. Ex. I (Standard Specifications § 104.07) (empowering the Engineer to make significant changes and then permitting adjustments to the contractor). There is no indication in Issue Six that the State made any direction that changed or increased the work, and, therefore, there was no significant change in the character of the work under which Raito could recover.

Raito also argues the bedrock constitutes a differing site condition under § 104.03 of the Standard Specifications. The State argues emphatically that Raito has not proved a differing site condition. The State relies in part on a United States Court of Federal Claims case for its holding that courts require a contractor claiming a differing site condition to prove by a preponderance of the evidence:

> "(1) that the contract affirmatively indicated subsurface conditions upon which the contractor's claims are based; (2) that the plaintiff acted as a reasonably prudent contractor in interpreting the contract documents; (3) that the contractor reasonably relied on the indications of subsurface conditions in the contract; (4) that the subsurface conditions actually encountered differed materially from subsurface conditions in the contract; (5) that the subsurface conditions encountered were reasonably unforeseeable; and (6) that the contractor's claimed excess costs were solely attributable to the materially different subsurface conditions." Renda Marine, Inc. v. United States, 66 Fed. Cl. 639, 651 (Fed. Cl. 2005).

This six-factor test, while not binding on this Court, is persuasive. Additionally, it seems to fit with the contract documents in this matter and their provisions relating to differing site conditions and the subsurface materials to expect at the site.

To alert the bidding contractor to the issue of possible subsurface materials and site conditions, the Standard Specifications here provide:

> "The **bidder is expected to carefully examine the site** of the proposed work, the Proposal, the Plans, the Rhode Island Standard Specifications for Road and Bridge Construction, Supplemental Specifications, Special Provisions, Distribution of Quantities and

> Contract Forms before submitting a Proposal. The **submission of a Proposal will be considered conclusive evidence that the bidder has made such an examination and is satisfied as to the conditions to be encountered in performing the work** and as to the requirements of the Contract as defined in the Contract Documents.
>
> "**Boring logs and other records of subsurface investigations** are available for inspection by bidders. It is understood that such information was obtained and used for Department design and **estimating purposes only**. It is made available to bidders so all have access to identical subsurface information available to the Department. Furthermore, this **information is not intended as a substitute for personal investigation, interpretations, and judgment of the bidders**." (3d Party App. Ex. 34 (Standard Specifications § 102.04) (emphasis added).)

Similarly, the Drilled Shaft Notes prominently contained within the contract Plan Sheets explicitly state:

> "The **estimated** top of bedrock elevations shown are **approximate** and shall be used for estimating purposes only.
> . . . .
> "**Actual field conditions may differ** from the indicated elevations. **Local variations from the indicated elevations should be anticipated**." (3d Party App. Ex. 37 (Plan Sheets) (emphasis added).)

The information provided in the Plan Sheets was derived from the test borings conducted by the engineer in the field. See id. Accordingly, both the Plan Sheets and the Standard Specifications advised the contractors that the bedrock quantities and subsurface data were estimates only, actual conditions may differ, and local variations should be anticipated. See 3d Party App. Exs. 34 (Standard Specifications § 102.04), 37 (Plan Sheets).

The particular job specifications reaffirm this. The Job Specifications provide:

> "Prior to submitting a bid, the Contractor shall review and understand all the information contained in the Geotechnical Data Report(s) and all other Contract Documents. The Contractor shall review the Geotechnical Interpretive Report(s), which are For Information Only. The Contractor shall **assume that actual**

> **subsurface conditions between borings could differ** from conditions shown in the records of the borings.
> . . . .
> ". . . Information in the Geotechnical Interpretive Report(s) are not factual data, but are interpretive information based upon the opinion of others. This information **shall not be a substitute for personal interpretation made by the Contractor**, and the Contractor is required to evaluate the interpretive information with the respective Geotechnical Data Report(s) and arrive at its own interpretations/conclusions. The State/Engineer and its representative, including its consultants, shall not be held liable for correctness nor accuracy of the interpretive information. The Contractor is solely responsible for drawing its own conclusions from the interpretive report(s)." (3d Party App. Ex. 4 (Job Specifications) (emphasis added).)

Thus, the test borings and subsurface data provided by the State represented only estimates on which Raito should not have relied, and Raito was forewarned in the contract documents that the subsurface conditions may differ.

Federal case law provides that "a differing site condition claim 'stands or falls upon what is indicated in the contract documents.'" Weeks Dredging & Contracting, Inc. v. United States, 13 Cl. Ct. 193, 219 (Cl. Ct. 1987). As one may expect, "[a] contractor cannot be eligible for an equitable adjustment for changed conditions unless the contract indicated what those conditions would supposedly be." P.J. Maffei Bldg. Wrecking Corp. v. United States, 732 F.2d 913, 916 (Fed. Cir. 1984). The indications of the contract generally present a question of law that may be decided by the court. See id.; Weeks Dredging & Contracting, 13 Cl. Ct. at 218.

In general, "[g]overnment estimates are not warranties." Stuyvesant Dredging Co. v. United States, 834 F.2d 1576, 1581 (Fed. Cir. 1987). Where the government warns and puts contractors on notice that it does not warrant the accuracy of the information, a contractor's assumption that conditions would be exactly as represented is unreasonable. See P.J. Maffei, 732 F.2d at 918. The contractor has an obligation to understand its undertaking and study all

aspects of the contract before submitting its bid. Renda Marine, 66 Fed. Cl. at 655. A contractor who relies on such estimates in contract documents then "assume[s] the risk that the information would prove inaccurate," and does not have grounds for an equitable adjustment. See P.J. Maffei, 732 F.2d at 918. As federal courts have stated, "[t]o hold otherwise would effectively render the government unable to direct a potential contractor to possibly helpful information without undertaking to stand on that information's accuracy." Id.; Weeks Dredging & Contracting, 13 Cl. Ct. at 222-23 (determining contractor misread contract documents as a guarantee of the composition and quantities of subsurface materials).

Specifically in the context of contract document representations of subsurface materials, "[b]orings may properly be viewed as contract indications relating to the character and nature of each of the anticipated subsurface materials . . . but may not reasonably be viewed as indications of the specific quantity of each such material." Renda Marine, 66 Fed. Cl. at 654 (citing Weeks Dredging & Contracting, 13 Cl. Ct. at 220) (internal citations and emphasis omitted). This federal law is consistent with the provisions of the contract documents in this case.

This Court is convinced that no reasonable fact finder could determine that Raito acted as a prudent contractor and justifiably relied on representations or that the encountered subsurface materials were unforeseeable, in view of the warnings and provisions contained within the Standard Specifications, the Plan Sheets, and the Job Specifications. As a matter of law, considering the persuasive federal cases, the conditions encountered by Raito—even judging the facts in the light most favorable to Raito—cannot constitute a differing site condition from those indicated in the contract documents. See P.J. Maffei, 732 F.2d at 916 (providing for determination of contract document representations as a matter of law). The contract documents provide that bedrock will be present. See 3d Party App. Ex. 37 (Plan Sheets). The contract

documents instruct Raito to inspect and examine the site, as well as the subsurface investigations made by the State. See id. at Exs. 4 (Job Specifications), 34 (Standard Specifications § 102.04). Further, the contract documents repeatedly emphasize that the representations of subsurface materials are estimates, the actual conditions may differ, and the contractor should assume and anticipate variations. See id. at Exs. 4 (Job Specifications), 34 (Standard Specifications § 102.04), 37 (Plan Sheets).

The indications made in the contract documents can not be considered warranties of the specific quantities of subsurface materials, and Raito, who failed to make its own investigation of the conditions, cannot now prove a differing site condition. See Renda Marine, 66 Fed. Cl. at 651, 654 (setting forth elements contractor must prove for differing site condition claim under federal law and explaining boring data may not be reasonably viewed as indications of specific quantity of material); Stuyvesant Dredging, 834 F.2d at 1581 (providing government estimates are not warranties). Raito unreasonably relied on the Plan Sheets and other contract documents, despite the explicit warnings that the indications were estimates and conditions would vary. See Renda Marine, 66 Fed. Cl. at 651 (providing federal requirements for differing site claim); 3d Party App. Exs. 4 (Job Specifications), 34 (Standard Specifications § 102.04), 37 (Plan Sheets).

Furthermore, even if Raito had a proper claim for a differing site condition, Raito did not provide any notice to the State of its claim for costs from the additional bedrock until its March 2007 REA. (3d Party App. Ex. 36 (Ferrara Aff. ¶¶ 22-23).) In addition, Raito did not calculate the actual amounts of bedrock or track its alleged additional costs because of the bedrock until it prepared the March 2007 REA. (3d Party App. Ex. 26 (McTigue Dep. Vol. 2, 191:11-192:5).) The State offers that because Raito did not provide notice of the additional bedrock and its claim for costs, the State was unable to verify the conditions, monitor the additional work, account for

the additional costs, or otherwise participate in an attempt to mitigate any differing condition, if one existed. (3d Party App. Ex. 36 (Ferrara Aff. ¶¶ 24-25).)

As with Issues Three and Four, the Court finds that Raito did not provide the State with the required notice to recover its alleged additional costs. There is no competent evidence in the summary judgment record demonstrating that Raito "promptly notif[ied] the other party in writing of the specific differing conditions before the site [wa]s disturbed and before the affected work [wa]s performed." (3d Party App. Ex. 34 (Standard Specifications § 104.03).) Raito worked on the affected shaft locations from April 2004 through August 2005, but did not provide notice until the March 2007 REA. See 3d Party App. Ex. 9 (Drill Shaft Installation Schedule – As Built). Raito did not provide notice in compliance with Standard Specification § 105.18(a), which requires notice "of its intention to make a claim for such additional compensation before beginning or continuing the affected work." (3d Party App. Ex. 34 (Standard Specifications § 105.18(a)).) Even if the State was aware of the bedrock, it does not necessarily follow that the State was aware Raito was going to make a claim or that the State was able to monitor and mitigate costs as it would have been with the proper, required notice under the Standard Specifications.

Because the Court finds as a matter of law that no differing site condition existed with respect to Raito's Issue Six claim, the Court grants the State's Motion for Summary Judgment. Additionally, the Court finds that even if a differing site condition had existed, Raito failed to provide the required notice for a successful claim for additional compensation.

G

Issue Eight

Additional Costs due to Allegedly Excessive Repair Demands at Shaft P 2-3

In the final issue subject to the State's Motion for Partial Summary Judgment, Raito claims it is owed additional costs because of excessive repair demands by the State to correct problems at Shaft P 2-3. Raito argues that the repairs demanded by the State constituted economic waste, while the State contends that they did not.

In August of 2005, Raito began filling concrete into the steel shaft casing at Shaft P 2-3, using what is known as the "tremie pipe" method. See 3d Party App. Ex. 6 (Summary). During the concrete placement, the tremie pipe broke, allowing sea water to mix with the concrete. See id. Testing by the State revealed three areas of "bad" or anomalous concrete within the Shaft P 2-3. See 3d Party App. Ex. 42 (Patricia D. Steere Aff. ¶ 6, Mar. 30, 2012). An analysis of the testing was sent to Raito on August 17, 2005 with the instruction that Raito take core samples, as purportedly required by the contract, but Raito did not perform the core testing. Id. at ¶ 7. The State's engineering firm, Haley & Aldrich, Inc. (H&A), also recommended that Raito obtain core samples.

At the suggestion of H&A, Raito retained an outside consultant, GEI Consultants (GEI), to design a repair procedure for the concrete shaft. See id. at ¶ 8; Pl.'s Mem. Ex. RR (Walker Dep. 16:5-11). Rather than submitting a formal repair proposal, GEI and Raito communicated directly with the State about a proposed method of repair that would involve drilling small holes down the length of the concrete shaft, then grouting steel bars into place in the areas of the anomalous concrete. Id. at ¶ 9. Patricia Steere, an engineer for Maguire Group, Inc. (Maguire), a structural engineering consultant for the State, forwarded Raito's unofficial proposal to H&A,

and H&A and Maguire both analyzed the proposed fix for approximately three weeks using computer models developed by Maguire. Id. at ¶ 9. According to the State, this three-week review was an expedited process to accommodate Raito. Id. Raito suggests, however, that the State only continued its review after an email inquiry from John Roma, Raito's project manager, regarding the State's lack of response. See 3d Party App. Ex. 45 (Emails).

On September 15, 2005, Ms. Steere emailed Mr. Roma and suggested a meeting to discuss the first proposed fix. Id. at ¶ 10. They scheduled a meeting for September 20, 2005. Id. Prior to the meeting, Ms. Steere again inquired whether Raito would take core samples and emailed Mr. Roma a list of questions and concerns Maguire and H&A prepared concerning the proposed fix. Id. at 10-11, Ex. 45 (Emails). Raito contends that the core samples were unnecessary because of crosshole sonic logging that had been conducted to identify weak zones of concrete. See Pl.'s Mem. Ex. PP (Simpson Gumpertz & Heger Investigation Report). The meeting took place, despite some concern between Raito and GEI that they would not have adequate responses to address the State's concerns. See 3d Party App. Ex. 47 (Emails). At the meeting, Raito was unable to respond to six of the repair questions posed by the State regarding imperfections in concrete that may have negatively affected the structural stability and longevity of the shaft. See 3d Party App. Ex. 42 (Steere Aff. ¶¶ 11-12).

The State also expressed concern that the first proposed fix method had not been successfully implemented in analogous situations in the past, and GEI acknowledged it was not a common repair procedure. See 3d Party App. Exs. 43 (Patricia Steere Dep. Vol. 2, 169:1-170:7, May 17, 2011), 40 (Michael Walker Dep. Vol. 1, 132:18-133:1, Nov. 21, 2011). Raito agreed at the September 20, 2005 meeting to take the core samples within the next two weeks and to explore an option of hydro-demolishing the anomalous concrete zones. See 3d Party App. Ex.

48 (Report of Meeting). According to the meeting minutes, the deposition testimony of Mr. Roma, and an internal memo of GEI, Raito's unofficial first proposed fix was not rejected at the meeting, and the parties agreed to take core samples and continue to assess the repair options. See 3d Party App. Exs. 7 (Roma Dep. Vol. 5, 116:3-10), 48 (Meeting Minutes), 49 (Memo).

Raito, however, states that the September 20, 2005 meeting quickly turned to discussing alternative fixes rather than the first proposed fix. See Pl.'s Mem. Ex. VV (Roma Dep. Vol. 5, 115:3-116:19). Mr. Roma of Raito testified that Ms. Steere did not reject the first proposed fix, and he was led to believe she was going to accept it. See id. Yet, Raito claims it understood that the proposed fix would not be accepted, and the first proposed fix was essentially rejected at the meeting. See Pl.'s Mem. Ex. WW (Letter).

A Rule 30(b)(6) deponent of Raito testified that the six repair questions posed by the State regarding the first proposed fix were reasonable and related to sound engineering concerns. See 3d Party App. Ex. 40 (Walker Dep. Vol. 1, 118:12-21). In fact, Mr. Walker of GEI acknowledged that if he were in the State's position, he would not have accepted the first proposed fix without satisfactory answers to those questions. See id. at Vol. 2, 148:17-149:10.

In the days following the September 20, 2005 meeting, Raito decided to withdraw the first proposed fix and to instead attempt to hydro-demolish the top eighty-one feet of the concrete in the shaft beginning on October 11, 2005. (3d Party App. Ex. 51.) Raito contends, on the other hand, that it did not decide to withdraw the first proposed fix but that it was effectively rejected by the State. The State and Cardi agreed to the hydro-demolition plan, which would have reinstalled the concrete in the shaft. See id.; Pl.'s Mem. Ex. WW (Letter). However, Raito still did not take core samples to measure the composition or consistency of the concrete, and

because the concrete was stronger overall than expected, the hydro-demolition plan failed. See 3d Party App. Ex. 42 (Steere Aff. ¶ 13).

The hydro-demolition subcontractor was able to achieve only about twenty percent of its anticipated production and characterized the progress as "painfully slow." (3d Party App. Ex. 52 (Emails), 53 (Letter).) Concerned that the process could take months and be extremely costly, Raito ceased hydro-demolition operations in early November of 2005 and re-evaluated its repair options. (3d Party App. Ex. 52 (Emails).) Raito finally agreed to take the core samples of the concrete, and according to the State, Raito expressed that it should have taken them sooner. See 3d Party App. Exs. 52 (Emails), 55 (Project Status Update).

After abandoning the hydro-demolition method of repair, Raito returned to its first proposed fix, but still had not addressed the State's six repair questions that it acknowledged were reasonable. See 3d Party App. Ex. 42 (Steere Aff. ¶ 14). Nonetheless, the State continued in its consideration of the method and expressed concern that it would not comply with American Association of State Highway and Transportation Officials (AASHTO) code. See 3d Party App. Ex. 42 (Steere Aff. ¶ 14), 56 (Email). Raito and the State disputed whether the AASHTO code applied, but Raito never presented the State with support for its first proposed fix or with complete responses to the six repair questions. See 3d Party App. Ex. 42 (Steere Aff. ¶¶ 14-15).

In late November of 2005, Raito proposed a third possible repair: hydro-demolishing only the "bad" or substandard portions of concrete in Shaft P 3-2. See id. at ¶ 15. Under this plan, the new concrete would have replaced only the anomalous concrete and resulted in irregular zones, which to the State raised engineering concerns about the future performance and structural strength of the shaft. See id. at ¶¶ 15-16. Raito now presents, however, that this

method would have replaced the "bad" concrete and avoided unnecessarily replacing the "good" concrete.

The State, instead, required Raito to replace three uniform, cylindrical zones of the shaft within which the substandard concrete was located. Id. at ¶ 17. Known as the "hockey puck" method, this procedure involved replacing both "good" and "bad" concrete, but would achieve uniform zones in the shaft and meet the State's requirements. Id. Raito, according to the State, did not provide any engineering analysis or calculations to counter the State's requirement of the "hockey puck" repair. See id. Instead, Raito performed the "hockey puck" repair between December 28, 2005 and March 16, 2006, and the State accepted the repair results on April 17, 2006. (3d Party App. Ex. 38.)

The Standard Specifications demand that the work performed and materials furnished be in "close conformity" with the contract requirements. (3d Party App. Ex. 34 (Standard Specifications § 105.03).) The Standard Specifications provide that:

> "In the event the Engineer finds the materials furnished, work performed or the finished project are not in reasonably close conformity with the Contract Documents, and have resulted in an inferior or unsatisfactory product, the work or materials shall be removed and replaced or otherwise corrected by and at the expense of the Contractor." Id.

Further, work that does not reasonably conform to the requirements is considered "unacceptable," and "[u]nacceptable work . . . shall be removed immediately and replaced in an acceptable manner at the Contractor's expense." Id. at § 105.11. As discussed previously, the State or its engineer has the authority to "decide all questions related to the quality and acceptability of materials furnished; work performed; and the rate of progress of the work . . . ." Id. at § 105.01.

In addition to the provisions of the Standard Specifications, the Job Specifications set forth that the State's "Engineer will be the sole judge of drilled shaft acceptance or rejection." (3d Party App. Ex. 4 (Job Specifications).) In the event a shaft is unacceptable, "the remediation shall be furnished without additional cost to the State and without an extension of the contract time." Id. Specifically:

> "The total cost for all changes required because of drilled shafts which are not installed in accordance with these Special Provisions or because of defective drilled shafts shall be borne solely by the Contractor at no additional cost to the State. These costs shall include costs for engineering, mobilization and demobilization, set-up, equipment, labor and materials, and for Engineer's additional services made necessary, as determined by the Engineer, by installation of drilled shafts which are not installed in accordance with these Special Provisions or defective drilled shafts." Id.

Both the Standard Specifications and the Job Specifications, therefore, require the contractor to repair and replace any work deemed unacceptable by the State at the contractor's expense. See 3d Party App. Exs. 34 (Standard Specifications §§ 105.03, 105.11), 4 (Job Specifications).

Despite the contract provisions, there is persuasive authority that "the government should not be permitted to direct the replacement of work in situations where the cost of correction is economically wasteful and the work is otherwise adequate for its intended purpose." Granite Constr. Co. v. United States, 962 F.2d 998, 1007 (Fed. Cir. 1992). A finding of economic waste, however, is limited to cases where the cost is "grossly and unfairly out of proportion to what will be attained." See Bethlehem Steel, 119 R.I. at 164, 379 A.2d at 356. In the Bethlehem Steel case, the Rhode Island Supreme Court acknowledged that the cost of repair was great when it amounted to about 25% of the total contract price, but the court could not find as a matter of law that the repair was unreasonable. Id. The court noted "no reason why the [State] should have to settle for something less than it bargained for." Id. at 166, 379 A.2d at 357. In Granite

Construction, though, the Federal Circuit Court of Appeals granted relief to a contractor when the federal government directed a complete replacement method that resulted in economic waste because the work performed, while not in strict compliance with the contract, was adequate and could have been repaired using a different method. 962 F.2d at 1006-08.

Here, the testimony is conflicted and disputes of fact remain that preclude this Court from granting the State's Motion for Summary Judgment as to Issue Eight. This Court cannot weigh the evidence and determine the factual question of whether the required fix constituted economic waste on this Motion. Such a determination is properly reserved for the fact finder, given the genuine disputes of material fact presented by Raito. The Court is not aware and has not been made aware of any case determining economic waste on a motion for summary judgment.

As discussed above, the parties dispute whether the first proposed fix was rejected by the State. Compare 3d Party App. Ex. 7 (Roma Dep. Vol. 5, 116:3-10 (acknowledging first proposed fix never rejected)) with Pl.'s Mem. Ex. WW (Ltr. from Raito to Cardi (noting "essentially an outright rejection" of the first proposed fix)). The facts are unclear whether Raito decided to attempt hydro-demolition or whether the State and Raito together reached that decision. See 3d Party App. Exs. 42 (Steere Aff. ¶ 13 (stating Raito withdrew first proposed fix and proposed hydro-demolition repair), 51 (Ltr. from Raito to Cardi (noting Raito, RIDOT, and Cardi "in agreement" to begin hydro-demolition repair)). Further, the facts as developed in the summary judgment record fail to demonstrate without dispute that there was a less-costly, alternative repair that would have adequately satisfied the contract with the State. See Bethlehem Steel, 119 R.I. at 164, 379 A.2d at 356 (providing economic waste standard); Granite Construction, 962 F.2d at 1006-08 (finding economic waste when work was adequate and could have been repaired using less costly method instead of completely replacing it). Raito offers

expert opinion in opposition to the Motion, but those facts and opinions were not available to the State when it directed the "hockey puck" repair. During the time the State was weighing repair options, Raito failed to answer reasonable questions about its proposed repair and failed to counter the State's requested "hockey puck" repair method. See 3d Party App. Ex. 42 (Steere Aff. ¶¶ 16-18).

The Court cannot determine based on the summary judgment record whether the cost of the "hockey puck" repair—particularly in comparison to other proposed repair methods—was grossly and unfairly out of proportion to the benefit it provided to the structural integrity of the shaft. See Bethlehem Steel, 119 R.I. at 164, 379 A.2d at 356 (applying economic waste doctrine when cost "grossly and unfairly out of proportion to what will be attained"). Given the genuine disputes of material fact and questions of fact remaining, the Court denies the State's Motion for Summary Judgment on Issue Eight.

H

Rhode Island Rules of Evidence Rule 408

The State has before this Court a Rule 408 Motion to limit the use of documents that it claims were created for purposes of settlement. Under Rule 408, evidence of offers to compromise a disputed claim are inadmissible to prove liability for or invalidity of that claim. See R.I. R. Evid. 408. Raito argues, in opposition to the Rule 408 Motion, that the documents were not prepared to settle a dispute, as the State had not yet rejected Raito's requests for equitable adjustment.

The Court, at this time, is not furnished with sufficient information to rule whether Rule 408 is implicated with respect to these documents. The State in its Rule 408 Motion lists a

significant number of Bates-numbered documents it argues should be inadmissible.[6] One document in particular has been identified by the State as the subject of its Rule 408 Motion, and that document is entitled "Analysis of Raito Corporation's Request for Equitable Adjustment." See 3d Party Def.'s Mot. in Limine Ex. D (Bates Range DOT027761-67). That document summarizes the analysis of a panel the State assembled to review Raito's March 2007 REA. See Robert Ferrara Aff. ¶¶ 5-8, June 11, 2012. In addition, other undated draft documents created by the panel are clearly labeled "for negotiation purposes only."[7] See 3d Party Def.'s Mot. in Limine Ex. E.

To rule whether a dispute existed, and thus whether the documents were created in connection with an offer to compromise a disputed claim, the Court would require additional information, including the date or dates on which all of the documents were created. It appears that in response to Raito's REA, the State assembled the panel to review the request. See 3d Party Def.'s Mot. in Limine Ex. A (Ltr. from State to Cardi, May 16, 2007). The panel began meeting on May 8, 2007, and then provided notice to Raito that it would make preliminary findings by August of 2007. See id. On June 26, 2007, however, Raito filed its Complaint in this action.

The panel had been meeting regularly from May through August of 2007. See Ferrara Aff. ¶ 6. At a meeting on June 21, 2007 (before Raito filed the Complaint), drafts of the panel's analysis with respect to Issues One, Five, and Eight were circulated and discussed. Id. at ¶ 7. In a July 19, 2007 meeting (after Raito filed the Complaint), drafts of the panel's analysis with respect to Issues Two, Three, Four, and Seven were circulated and discussed. Id. The panel met

[6] The Bates numbers of the claimed "settlement documents" are: HA17525-856, DOT26891-7767, MG0660-6974, and PC23277-4272.

[7] The Court at this time does not have a copy of all of the "settlement documents" subject to the State's Rule 408 Motion.

for a final time on August 30, 2007, and the final draft of the panel's position was completed sometime in September of 2007. See id. at ¶ 8; 3d Party. Def.'s Mot. in Limine Ex. D. Thus, it appears various versions or portions of the panel analysis were created both before and after litigation commenced. It is not evident to the Court when any of the other documents subject to the instant motion were created.

Further, without more information, the Court cannot rule whether all of the documents constitute inadmissible offers to compromise or evidence of settlement negotiations. See Votolato v. Merandi, 747 A.2d 455, 461 (R.I. 2000) (stating "offers to compromise and evidence of settlement negotiations generally are not admissible into evidence"). Raito argues that the panel analysis and other documents were created in the course of administering the contract and not to settle a dispute. In addition to when the documents were created, the Court would require more information with respect to the contents and purposes of the documents. To the extent that evidentiary hearings may be required to uncover any of that information, the parties may proceed in a manner consistent with appropriate practice.

IV

Conclusion

After due consideration, the Court grants the State's Motion for Partial Summary Judgment as to Issues Three, Four, and Six. Raito failed to provide proper notice of its claims under Issues Three and Four, and Raito failed to establish a differing site condition on Issue Six. The Court denies the State's Motion for Partial Summary Judgment as to Issues One A, Two, Five, and Eight. The steel price claim is not barred at this juncture by the doctrines of laches or equitable estoppel, and genuine disputes of material fact exist precluding summary judgment on

Issues Two, Five, and Eight. Counsel for the State shall present an Order consistent herewith which shall be settled after due notice to counsel of record.