STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

CASHMAN EQUIPMENT CORPORATION, INC., *Plaintiff,*	:	
v.	:	**C.A. No. PB-2011-2488**
CARDI CORPORATION, INC.; SAFECO INSURANCE CO., INC.; RT GROUP, INC.; JAMES RUSSELL; STEVEN OTTEN; CARDI MATERIALS, LLC; SPECIALTY DIVING SERVICES, INC.; HALEY & ALDRICH, INC. *Defendants,*	:	
v.	:	
WESTERN SURETY COMPANY; RHODE ISLAND DEPARTMENT OF TRANSPORTATION, *Third-Party Defendants*	:	

(FILED: September 20, 2021)

DECISION

TAFT-CARTER, J. This matter is before the Court for decision following a non-jury trial on the issue of liability in connection with the replacement of the Sakonnet River Bridge, which spans the Sakonnet River between the Towns of Tiverton and Portsmouth, Rhode Island (Project). Cashman Equipment Corporation, Inc. (Cashman), a subcontractor on the Project, filed an action for breach of contract and related claims against the contractor, Cardi Corporation (Cardi) and Safeco Insurance Company, Inc. (Safeco) in May 2011.[1]

[1] In its original complaint, Cashman also brought claims against RT Group, Inc. (RTG). Cashman, RTG, and later-added defendants James Russell and Steven Otten entered into a stipulation on

Cashman proceeded to trial on the following counts, asserted in its Fifth Amended Complaint (Complaint) against Cardi: Counts I, breach of contract—failure to pay; II, unjust enrichment; III, breach of contract—defective hanger bracket design; XIV, breach of contract/quantum meruit—extra work, analysis of cofferdam design; and XVIII, negligence—provision of defective designs.[2] Cashman also proceeded to trial on two claims against defendant Specialty Diving Services (SDS): Counts XXXIII, breach of contract, and XXXIV, indemnity and contribution. Cardi answered the Complaint and filed counterclaims (Counterclaim) against Cashman alleging breach of contract, negligent construction, fraud, breach of good faith and fair dealing, and defective engineering. Cardi also brought one claim against Western Surety Company (Western) for recovery under a performance bond.

The trial began in October 2019 and proceeded for forty-three days, through February 2020. The evidence at trial included testimony from eighteen witnesses, as well as hundreds of exhibits. The witnesses testifying at trial were John McNulty, David Fish, Mark Greenleaf, Paul Williams, Anthony Weaver, Michael Studley, Stephen A. Cardi, Gregory Maurer, Richard Savoy, Kazem Farhoumand, Carl Engle, Sean Cook, Keith Catanzaro, Jim Russell, Steven Otten, William Konicki, Paul Grimaldi, and George Tamaro. The liability and damage claims presented in Cashman's Complaint and Cardi's Counterclaim were bifurcated during the course of the trial for

October 30, 2019, dismissing all claims asserted against each party. *See* Dismissal Stip., Oct. 30, 2019.

[2] In its Post-Trial Memorandum, Cashman stated it was "proceeding on the following causes of action against Cardi": Counts I-III, XIV, and XVIII. (Cashman's Post-Trial Br. 198.) Additionally, Cashman stated that it "also prosecuted Count XXIII, its claim against Cardi's payment bond through its surety, Safeco." *Id.* at 198, n.14. However, because Count XXIII is dependent on whether Cashman prevails, this claim would be addressed by Cashman during the damages phase of this trial, if necessary. *Id.*

the sake of judicial economy. (Trial Tr. 57:16-24, Feb. 5, 2020.) The trial on damages will proceed after a determination of liability with respect to the marine cofferdams.[3]

At the conclusion of Cashman's case-in-chief, SDS filed a Motion for Judgment as a Matter of Law pursuant to Rule 52(c) of the Superior Court Rules of Civil Procedure. The Court reviewed the trial evidence and determined that the evidence was insufficient to sustain either claim asserted by Cashman against SDS, and therefore SDS was entitled to a judgment as a matter of law. (Trial Tr. 13:9-10, Feb. 18, 2020.) On February 13, 2020, Cardi moved for a judgment as a matter of law, pursuant to Rule 52(c), as to Counts III and XVIII of Cashman's Fifth Amended Complaint. (Trial Tr. 65:4-8, 66:2-67:2, Feb. 13, 2020.) Cardi argued that Cashman did not meet its burden of proof with respect to these claims. *Id.* at 66:9-20. The Court heard argument on February 18, 2020 and reserved its decision until after the conclusion of the trial. (Trial Tr. 13:14-18, Feb. 18, 2020.)

On May 5, 2020, Western filed a Rule 52(c) motion, which is also before the Court. Cashman and Cardi filed post-trial memoranda on August 31, 2020. Jurisdiction is pursuant to Rule 52(a) of the Rhode Island Superior Court Rules of Civil Procedure and G.L. 1956 § 8-2-14.

I

Findings of Fact

The Court has reviewed the testimony and the evidence presented at trial and now makes the following findings of fact.

[3] Also bifurcated were liability and damage issues relating to the "Type F [Concrete]/Passthrough." *See* Joint Suppl. to Mot. for Further Bifurcation at ¶ 3, filed June 28, 2019. The trial with respect to Phase I damages will be scheduled after the issue of liability has been resolved. (Trial Tr. 58:16-17, Feb. 5, 2020.)

A

Project Beginning

The Sakonnet River Bridge was opened to traffic in 1956. (Trial Tr. 5:24, Nov. 21, 2019.) In 1994 or 1995, the Rhode Island Department of Transportation (RIDOT) saw a need to repair the bridge. *See id.* at 5:21-6:13. The initial goal was to rehabilitate it; however, for a variety of reasons, RIDOT ultimately decided to replace the bridge. *Id.* at 6:12-7:2.

On October 22, 2008, the State of Rhode Island Department of Administration's Division of Purchases (Division of Purchases) advertised to highway and bridge contractors that sealed bids would be accepted for the Replacement of the Sakonnet River Bridge 250 "Steel Alternative." [4] (Trial Ex. 1529 at A-2; Trial Tr. 6:18-19, Nov. 1, 2019.) The bids were scheduled to be opened on January 21, 2009. (Trial Ex. 1529 at A-2.)

Prior to the advertisement, RIDOT bridge engineers contracted the Project specifications and drawings to several consulting engineering firms, including Commonwealth Engineers & Consultants, Inc. (Commonwealth) and Haley & Aldrich, Inc. (H&A). (Trial Tr. 7:22-8:16, Nov. 1, 2019; Trial Tr. 5:21-6:2, Nov. 5, 2019.) Commonwealth prepared some of the job-specific specifications, while other sub-consultants, including H&A, prepared other segments of the Project. (Trial Tr. 8:11-16, Nov. 1, 2019; Trial Tr. 6:11-13, Nov. 5, 2019.)

1

Marine Cofferdam Component

A key portion of the Project involved the design and construction of marine cofferdams. A marine cofferdam is a temporary, watertight enclosure built in the water for specialized

[4] This advertisement referred to Rhode Island Contract No. 2008-CB-056 R.I. Federal-Aid Project Nos. BRO-0250(010), 3RD-PRTY(200), 3RD-PRTY(201) and 3RD-PRTY(202), County of Newport, Towns of Portsmouth and Tiverton, Rhode Island.

construction. *See* Trial Tr. 5:17-24, Oct. 31, 2019; Trial Tr. 10:19-13:25, Feb. 6, 2020; *see also* Qin Qian, et al., *Cofferdam*, *in* ENCYCLOPEDIA OF ENGINEERING GEOLOGY: ENCYCLOPEDIA OF EARTH SCIENCE SERIES (Peter T. Bobrowsky & Brian Marker eds., 2018), https://doi.org/10.1007/978-3-319-12127-7_59-1. The design of a marine cofferdam involves subdisciplines of civil engineering, namely structural and geotechnical engineering.[5] *See* Trial Tr. 10:19-13:25, Feb. 6, 2020. H&A drafted the project specifications for the marine cofferdams. (Trial Tr. 6:11-13, Nov. 5, 2019.)

The marine cofferdams' construction included components known as hanger brackets. (Trial Exs. 1308, 1309, 1310, 1311.) The function of a hanger bracket is to support a load placed on it while the concrete sets. (Trial Tr. 50:8-14, Jan. 30, 2020; Trial Tr. 68:16-21, Dec. 5, 2019; Trial Tr. 29:10-16, Feb. 6, 2020.) The weight of the concrete to be placed onto the hanger brackets during the Project totaled approximately five million pounds. (Trial Tr. 23:3-9, Jan. 30, 2020; Trial Tr. 65:21-66:5, Feb. 7, 2020.) Therefore, the hanger brackets were an essential component of the marine cofferdams during the concrete pour. *See* Trial Tr. 68:16-21, Dec. 5, 2019.

2

Bid Specifications

The award of the Project was based on "the total bid for all quantities of work in the proposal subject to review and correction as provided for in the Rhode Island Department of Transportation Standard Specifications for Road and Bridge Construction and Standard Details."[6]

[5] A marine cofferdam is a complex engineering structure. (Trial Tr. 17:5-7, Nov. 1, 2019.) Many witnesses described the order in which the cofferdams were erected in layperson's terms. These credible testimonies assisted the Court in understanding this complex and technical engineering problem. *See, e.g.*, Trial Tr. 6:9-7:7, Oct. 31, 2019; Trial Tr. 12:12-16:1, Nov. 1, 2019; Trial Tr. 7:24-8:8, Jan. 30, 2020; Trial Tr. 10:13-13:25, Feb. 6, 2020.

[6] The "State of Rhode Island Standard Specifications for Road and Bridge Construction and Standard Details," as referenced in the bid package, includes "The Rhode Island Standard

(Trial Ex. 1529, at A-1.) All construction contracts awarded by RIDOT are governed by the current Standard Specifications, except where modified by contract or specification.[7] During this Project, the 2004 edition controlled. *Id.* at A-2. These standards are commonly referred to as the "Blue Book." (Trial Tr. 75:24-76:3, Nov. 1, 2019.)

Control of the work is governed by Section 105 of the Blue Book. *See* Trial Ex. 1501, at § 105.01. Furthermore, pursuant to § 105.03, work for the Project must be performed in "reasonably close conformity" with the contract documents.[8] (Trial Ex. 1501, at § 105.03.) All "[s]hop drawings must be approved by the Engineer prior to performance of the work involved." (Trial Ex. 1501, at § 105.02.) The "Engineer" in the Blue Book refers to the chief engineer at RIDOT, Kazem Farhoumand (Mr. Farhoumand). *Id.* at § 101.23; Trial Tr. 101:20-23, Nov. 4, 2019. All major deviations from or modifications to the specifications or approved design drawings required written approval by RIDOT. *See* Trial Tr. 103:2-21, Nov. 4, 2019; Trial Ex. 1501, at § 108.06.

Specifications for Road and Bridge Construction, 2004 Edition"; "The Rhode Island Standard Details, 1998 Edition, with all revisions"; and the "Rhode Island Bridge Standard Details, 2003 Edition." (Trial Ex. 1529, at A-1.) These documents, along with the "Construction Plans, . . . the Compilation of Approved Specifications, . . . the Required Contract Provisions for Federal-Aid Construction Contracts, the General Provisions, . . . the Contract-Specific General Provisions, the Job-Specific Specifications," and documents related to "Quest Lite" software, were contained on a compact disc included in the bid package. (Trial Ex. 1529, at A-2; Trial Tr. 7:11-14, Jan. 6, 2020.)

[7] The parties were required to adhere to all specifications incorporated into the bid package documents. The Court references only a few sections of these requirements here and discusses other relevant sections as necessary throughout the Decision.

[8] As defined by the Blue Book, the "Contract Documents" include "The Notice to Contractor (advertisement for bids); Proposal; Contract Bond(s); Standard Specifications; Supplemental Specifications; Special Provisions; General and Detailed Plans; Notice of Award; Notice to Proceed; and any subsequently executed Contract Addenda that are required to complete the construction of the work in an acceptable manner, including authorized Contract Time Extensions." (Trial Ex. 1501, at § 101.11.)

The bid documents also included a number of specifications to which the parties were required to adhere. *See* Trial Tr. 7:11-14, Jan. 6, 2020; Trial Ex. 1529, at A-2. "Code 203.99 Marine Cofferdams" related specifically to the construction of the Marine Cofferdams. (Trial Ex. 1162; Trial Tr. 26:21-25, Nov. 1, 2019.) It included a description of the work, materials, construction methods, including qualifications, method of measurement, and basis of payment. *See* Trial Ex. 1162.

B

Cardi Formulates its Bid

1

Cardi/Cashman Pre-Bid Agreement

Cardi, an experienced heavy construction contractor in the state of Rhode Island, and Cashman, a sophisticated construction company with an expertise in marine construction, expressed interest in the Project as early as December 2007. (Trial Tr. 6:12-14, Nov. 8, 2019; Trial Tr. 57:19-23, Dec. 3, 2019; Trial Tr. 9:22-10:1, Oct. 31, 2019.) These companies eventually forged a bond that resulted in an agreement that Cardi would submit a bid to the State for the entire Project, acting as the sole prime contractor. (Trial Ex. 1301, at 5-6.) Cashman would then act as the "exclusive subcontract[or]" for the foundation and marine construction of the bridge. *Id.* at 1-2. The work would involve both land and water construction. *Id.* To memorialize this understanding, Cardi and Cashman entered into a "Pre-Bidding and Exclusive Subcontractor Agreement" on December 3, 2008 (Pre-Bid Agreement), negotiated in part by Stephen A. Cardi (Mr. Cardi) and Jamie Cashman and Dick Zellen for Cashman. (Trial Ex. 1301; *see* Trial Tr. 78:11-13, Nov. 7, 2019; *see also* Trial Tr. 10:15-19, Oct. 31, 2019.)

The Pre-Bid Agreement provided that it was the parties' "desire to form a Prime Contractor/Exclusive Subcontractor team to submit a joint bid . . . based on their respective scope of work to the Owner . . . ." (Trial Ex. 1301, at 1.) In the event that "the Bid is accepted by the Owner, Cardi will enter into a contract . . . with the Owner for the performance of such construction work," and if Cardi was awarded the contract, Cashman and Cardi would complete the work as "Prime Contractor/Exclusive Subcontractor," subject to certain terms and conditions. *Id.* at 1; *see also* Trial Tr. 87:12, Nov. 7, 2019 (Mr. Cardi testifying that Cardi and Cashman "would work as an exclusive, prime sub relationship.").

Cashman's scope of work included "furnish[ing] and install[ing] . . . support of excavation and its removal where necessary. . . pile foundation and . . . tremie concrete."[9] (Trial Ex. 1301, at 1.) The Pre-Bid Agreement specified that Cashman would "provide labor, materials (except F&I reinforcing steel), equipment and supervision to complete the work within its scope of work." (Trial Ex. 1301, at 1-2.) The Pre-Bid Agreement was incorporated into the terms and conditions of the Subcontract Agreement executed by Cardi and Cashman on January 27, 2009. *See* Trial Ex. 1303, at 3.

2

Cardi Hires RTG

Gregory Maurer (Mr. Maurer) was hired by Cardi in the fall of 2008 as an estimator for the Project. (Trial Tr. 75:18-24, Nov. 13, 2019.) Estimators formulate bid proposals by considering the costs for the work as set forth in the contract documents as well as the costs "associated with

[9] David Fish (Mr. Fish) testified that the term "furnish and install" meant, in this case, that Cashman, as "the subcontractor[,] would be required to furnish all the components that are necessary to construct and install the cofferdam complete in place." (Trial Tr. 78:2-7, 22-24, Nov. 4, 2019.)

contactor-controlled items, like the cofferdam[s]." (Trial Tr. 9:16-22, Nov. 14, 2019.) The assistance of a professional engineering firm, such as RTG, is necessary to establish a price for contractor-controlled items because the plans provided by RIDOT contain insufficient information to formulate the labor and materials costs. *Id.* at 9:22-24, 10:10-14.

Mr. Maurer approached James Russell (Mr. Russell), a registered professional engineer[10] and principal for RTG, to assist Cardi with Professional Engineering Services during the pre-bid phase of the Project.[11] (Trial Tr. 4:17-19, Jan. 22, 2020; Trial Tr. 64:25-65:2, Jan. 23, 2020.) It was agreed that RTG would assist Cardi with pre-bid Professional Engineering Services at their own expense during the pre-bid phase, with the understanding that Cardi would retain RTG for the post-bid engineering for the Project. (Trial Tr. 90:24-91:4, Nov. 13, 2019; Trial Ex. 11; Trial Ex. 12.) This type of arrangement is a common practice in the industry. (Trial Tr. 62:24-63:2, Jan. 23, 2020.)

During the pre-bid process, Mr. Russell selected Steven Otten (Mr. Otten), a registered engineer, as the engineer of record relative to the design of the marine cofferdams. (Trial Tr. 27:12-17, Jan. 22, 2020.) Mr. Otten was chosen by Mr. Russell based on his skill level. *Id.* at 27:22-28:4. His selection as engineer of record was made despite the fact that he had never designed a hanging marine cofferdam similar to the one contemplated for the Project. *See* Trial Tr. 27:25-28:14, Jan. 22, 2020.

[10] A registered professional engineer is someone who has obtained a "PE license." *See* Trial Tr. 4:8-9, Nov. 1, 2019. A PE license signifies that a person has the expertise to safely design certain structures within their expertise such as buildings, bridges, or highways. *Id.* at 4:13-20. A registered professional engineer has the responsibility to ensure public safety in the components they design. *Id.*

[11] Mr. Russell is a shareholder, the principal senior project manager, and the president of RTG. (Trial Tr. 3:13-16, Jan. 22, 2020.)

John McNulty (Mr. McNulty) was Cashman's representative tasked to work with RTG during the pre-bid phase. (Trial Tr. 65:9-66:6, Jan. 23, 2020.) Mr. McNulty, a long-time employee of Cashman, had extensive expertise in marine construction. (Trial Tr. 3:16-20, Oct. 31, 2019; Trial Tr. 54:12-14, Dec. 3, 2019.) During the pre-bid process, there were multiple meetings between Mr. Maurer, Mr. Russell, and Mr. McNulty to discuss the Project. (Trial Tr. 65:24-66:2, Jan. 23, 2020.)

The pre-bid conceptual plans designed by Mr. Otten were based on a model created by Mr. McNulty. (Trial Tr. 20:4-12, Jan. 30, 2020; *see* Trial Tr. 66:18-21, Jan. 23, 2020; *see also* Trial Exs. 2545, 2558.) While it is true that Mr. McNulty's model did not include hanger brackets, it was clear that the "whole concept was to hang [the marine cofferdams] off of the piles." (Trial Tr. 20:23-21:1, Jan. 30, 2020.) The credible evidence establishes that the preliminary design, as prepared by RTG on behalf of Cardi, was based on Mr. McNulty's model. (Trial Ex. 5271A; Trial Ex. 1509; Trial Ex. 5271B (email including a table attachment that stated it was "[p]repared by RTG for CARDI").)

On January 20, 2009, Cashman and Cardi amended the Pre-Bid Agreement (Pre-Bid Amendment). (Trial Ex. 1302.) Pursuant to the Pre-Bid Amendment, it was agreed that Cardi would absorb the costs for RTG's engineering services in its bid proposal. (Trial Ex. 1302, at 1, 5; Trial Tr. 7:1-18, Nov. 14, 2019.) This avoided the risk of duplication or omission. (Trial Tr. 7:1-18, Nov. 14, 2019.) The arrangement also allowed Cardi to maintain a low bid proposal. *See id.* at 7:20-22. Throughout the process, Cashman never questioned RTG's qualifications. *Id.* at 9:4-6.

C

Contracts

1

Prime Contract

On January 21, 2009, Cardi submitted its bid for the Project. (Trial Ex. 1529.) Cardi's bid was accepted upon bid opening, and thereafter Cardi entered into a "Contract Agreement" with the Division of Purchases (Prime Contract) on April 16, 2009. (Trial Ex. 5273, at 1.) Under the Prime Contract, Cardi agreed "to furnish all equipment . . . and labor . . . and to do and perform all work" for the Project "*in strict conformity with* the provisions of th[e] contract agreement, the notice to contractors, the proposal, the specifications and the plans approved by the Engineer, as defined in the specifications." *Id.* (emphasis added). Pursuant to § 101.11 of the Blue Book, the Prime Contract and "Contract Documents" comprised "one instrument." *See* Trial Ex. 1501, at § 101.11(c).

The provisions of the Prime Contract, as well as the expressly incorporated "notice to contractors, proposal, specifications and plans," required Cardi: (a) to build the cofferdams in accordance with the approved cofferdam plans; (b) to obtain approval for work on the cofferdam plans through a detailed submittal process of the cofferdam plans; and (c) not to perform any work that deviated from the cofferdam plans without prior written approval. *See* Trial Ex. 5273; *see also* Trial Ex. 1501, at §§ 105.02, 108.06; Trial Ex. 1162, at JS-105.

2

Subcontract

On January 27, 2009, Cardi and Cashman executed a Subcontract Agreement (Subcontract). (Trial Ex. 1303.) The Subcontract price totaled $34,633,306.38. *Id.* at 3.

The Subcontract expressly incorporated the Pre-Bid Agreement, the Pre-Bid Amendment, and the terms of the Prime Contract, including the Project's "General Conditions, Special Provisions, Drawings, Specifications, Amendments and Addenda thereto." *Id.* at 1, 3. The Subcontract also bound Cashman to all of its terms and conditions and to all contract documents. *Id.* Furthermore, Article I of the Subcontract required Cashman to "provide all labor, materials, skills and services [n]ecessary for the execution and completion, satisfactory to the Owner of the work as detailed in ARTICLE II hereof, according to the Prime Contract . . . ." *Id.* at 1.

The Subcontract also outlined the land and marine work to be performed. *See* Trial Ex. 1303, at 22-25, 29-33; *see also* Trial Tr. 20:9-25:13, Oct. 31, 2019. Cashman retained the marine portion of the work, which included installing seventy-two-inch piles into the river and marine cofferdam form systems at Piers 4, 5, and 6. *See* Trial Ex. 1303, at 23; Trial Tr. 24:2-7, Oct. 31, 2019. Cashman subcontracted the work related to the construction of the land-based Piers 1, 2, 3, 7, and 8 to the CRC Company. (Trial Tr. 25:17-22, Oct. 31, 2019.)

a

Indemnification

Article XXIII of the Subcontract contained an indemnification clause. (Trial Ex. 1303, at 17-18.) The clause provided that

> "[t]he subcontractor shall indemnify and hold the Contractor harmless from any and all liability, loss claims or damage which the Contractor may suffer as a result of demands, costs, judgments or claims of any nature against the Subcontractor or the Contractor which arise out of the acts or neglects of the Subcontractor, it's [*sic*] officers, agents, employees or independent contractors, whether pursuant to the performance of this Subcontract or the Contract." *Id.*

The Subcontract further provided that the Subcontractor

> "shall be liable to Contractor . . . for any actual damages suffered by the contractor, and . . . in the amount set forth in the Prime Contract

> for the Subcontractor's portion of fixed, agreed and liquidated damages for each calendar day of delay until the work is completed or accepted, except and unless Subcontractor's performance . . . is delayed or interfered with by acts of the Owner, Contractor or other Subcontractors." *Id.* at 10.

b

Performance Bond

The Subcontract required that Cashman secure a performance bond in the amount of the Subcontract, guaranteeing performance. *Id.* at 3. On June 15, 2009, Western issued Performance Bond 929441133, guaranteeing prompt and faithful performance of the Cardi-Cashman Subcontract. (Trial Ex. 1562A.) The bond, executed by Cashman in favor of Cardi, was intended to protect Cardi in the event that Cashman defaulted. *Id.*

The bond provided that, should such default of the Subcontract occur,

> "(1) Surety may promptly remedy the default subject to the provisions of paragraph 3 herein, or;
> "(2) [Cardi] after reasonable notice to Surety may, or Surety upon demand of [Cardi] may arrange for the performance of [Cashman's] obligation under the subcontract subject to the provisions of paragraph 3 herein[.]" *Id.* at 1.

In addition, there were two conditions precedent to triggering Western's liability: Cardi was required to declare Cashman in default, and Cardi was required to file suit in accordance with the timeframe in the bond. *See id.*

3

Agreements with RTG

On January 28, 2009, Cardi executed the initial "Purchase Order Agreement" with RTG (Purchase Order). (Trial Ex. 27.) In that Purchase Order, RTG agreed to provide all of the engineering work necessary for the design of the marine cofferdam. *Id.* at 1; *see* Trial Tr. 105:10-18, Nov. 13, 2019; Trial Tr. 31:10-13, Jan. 22, 2020. While it was clearly contemplated that RTG

would provide stamped plans, RTG was not bound to inspect any of the work performed by Cashman.[12] (Trial Ex. 27; Trial Tr. 104:23-105:4, Jan. 22, 2020; Trial Tr. 106:5-9, Nov. 13, 2019.) Rather, it was Cashman's obligation to ensure that its work complied with the marine cofferdam design plans and specifications. (Trial Tr. 57:24-58:3, Dec. 3, 2019.)

Cardi was obligated to pay RTG a lump sum payment of $54,000.00, or $18,000.00 per cofferdam. (Trial Ex. 27, at 1.) As of April 14, 2010, RTG had billed Cardi for 99.5 percent of the work performed for the design and engineering of the marine cofferdams. (Trial Ex. 252; Trial Tr. 80:23-81:1, Jan. 22, 2020.) The Purchase Order also required RTG to secure professional liability insurance in the amount of $3 million. (Trial Ex. 27, at 2.)[13]

All work performed by RTG on behalf of Cashman that was not within the scope of Cashman's agreement with Cardi or the Cardi estimate was invoiced directly to Cashman. *See* Trial Ex. 5274; *see also* Trial Exs. 52, 252; Trial Tr. 38:21-39:5, 80:16-22, Jan. 22, 2020. For instance, RTG billed Cashman directly for completing additional analysis and providing details for forming and pouring the precast panels for the marine cofferdams. (Trial Tr. 83:7-84:19, Jan. 22, 2020; Trial Ex. 257.) The credible evidence indicates that throughout the construction phase, RTG invoiced both Cardi and Cashman. *See, e.g.*, Trial Exs. 252, 282.

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[12] RTG later assumed some inspection responsibilities during the repair process. (Trial Tr. 87:21-88:8, Jan. 23, 2020.) RTG executed a separate purchase order detailing the inspection duty. *Id.*

[13] The Indemnity Clause contained in the Purchase Order was later amended. (Trial Ex. 1543, at 6.) The new language related to the indemnity clause provided the following:

> "*To the extent covered by the Consultant's (RT Group Inc.) insurance, the Consultant agrees to indemnify and hold harmless the Owner (CARDI CORPORATION) from and against liability for damages to the extent they are caused by the negligent acts, errors, or omissions of the Consultant in the performance of the Consultant's professional services under this Contract*." *Id.*

Cardi was named as an additional insured under RTG's general liability policy. (Trial Ex. 38, at 3; Trial Tr. 34:10-35:1, Jan. 22, 2020.)

D

Designing the Marine Cofferdams

At the same time that the various agreements were being formed, RTG and Mr. McNulty began working on the design plans for the marine cofferdams. (Trial Tr. 88:10-19, Jan. 23, 2020; Trial Tr. 22:7-11, Jan. 30, 2020.) While Mr. McNulty has denied any involvement in the design of the marine cofferdams, the competent and credible evidence indicates otherwise. (Trial Tr. 95:24-96:2, Dec. 3, 2019.) In fact, the trial record clearly and unambiguously shows that Mr. McNulty worked extensively in collaboration with RTG to develop the marine cofferdam design that was eventually submitted to RIDOT. (Trial Tr. 90:15-17, Jan. 23, 2020.) Mr. McNulty often communicated with Mr. Russell. *Id.* at 92:14-22, 95:21-96:13; Trial Ex. 47; *see also* Trial Ex. 1534, at 2. The credible evidence demonstrates that Mr. Russell took his "marching orders" concerning the marine cofferdam design from Mr. McNulty. (Trial Tr. 91:10-23, Jan. 23, 2020.)

Furthermore, Mr. Otten credibly testified that until the fall of 2010, when Cardi became involved in the marine cofferdam engineering, he interacted with Mr. McNulty. (Trial Tr. 52:11-14, Feb. 4, 2020.) Throughout the design process, RTG "continually met with [Mr. McNulty]" because RTG had great confidence "in his technical expertise." *Id.* at 53:21-23. Furthermore, Mr. McNulty was responsible for overseeing the construction of the marine cofferdams. *See id.* Therefore, RTG "tap[ped] into" his knowledge and experience in an effort to coordinate the design "as a team." *Id.* at 53:23-54:3. The final marine cofferdam plans, including the hanger bracket and rod system, were engineered and designed by Mr. Otten based upon the models and ideas conceived by Mr. McNulty. (Trial Tr. 20:9-18, Jan. 30, 2020.) Mr. Otten stamped the plans and performed calculations for various aspects of the designs to ensure that the structures would be able to carry the estimated five million pounds of concrete they would be required to hold. *Id.* at

9:3-5, 22:12-23:13. Throughout the design process, Mr. Otten performed STAAD modeling and other calculations required in designing the marine cofferdams.[14] *Id.* at 23:14-25:21.

E

Design Submittal to RIDOT

1

Process

The Prime Contract required that the marine cofferdam design be submitted and approved prior to the start of the marine cofferdam installation. (Trial Ex. 5273; Trial Ex. 1162, at JS-105; Trial Ex. 1501, at § 105.02; Trial Tr. 84:17-21, Dec. 3, 2019; Trial Tr. 2:17-18, Dec. 4, 2019.) Mark Greenleaf (Mr. Greenleaf), a registered professional engineer, was project manager for the Project at Commonwealth. (Trial Tr. 2:17-19, 4:19-24, Nov. 5, 2019.) Mr. Greenleaf, although not the principal reviewer of the marine cofferdam submittals, was a participant in the review process. *Id.* at 8:19-21. Once submitted to Commonwealth, the plans underwent staff review to assure that the submittal conformed with the contract documents as well as all codes. *Id.* at 9:3-6. As a general practice, the calculations were not reviewed unless there appeared to be an irregularity. *Id.* at 39:14-40:13. Calculation review was conducted by the engineer preparing the plans, in this case RTG. *Id.* at 41:5-17; Trial Tr. 93:19-24, Jan. 22, 2020.

After Commonwealth's staff review was complete, the findings and recommendations were discussed and then forwarded by letter to RIDOT. (Trial Tr. 8:20-23, Nov. 5, 2019.) Once the plans were received, the RIDOT project engineer performed a "cursory" review to assure that the submittal "was in general conformance with the specifications and the . . . contract documents."

[14] STAAD is a structural software program permitting designs and calculations to be loaded into it. It can then provide either sound designs for certain structures or indicate whether a certain structure will work or not with the design provided. *Id.* at 23:18-19, 24:11-19.

(Trial Tr. 9:2-15, Nov. 1, 2019.) It is clear that only after a complete and thorough review, involving multiple levels of scrutiny, were the marine cofferdam plans accepted by RIDOT as satisfactory.

2

Design Codes

RIDOT took a "fairly conservative" approach to the design of the marine cofferdams. (Trial Tr. 126:8-13, Nov. 4, 2019.) This approach ensured that all safety factors were incorporated into the design through compliance with and implementation of applicable design codes. *Id.* Numerous witnesses credibly testified that the marine cofferdam design was required to comply with the following Design Codes: (1) The 2008 Interim Revisions to the American Association of State Highway and Transportation Officials' (AASHTO) Guide Design Specifications for Bridge Temporary Works (AASHTO Guidelines) (Trial Ex. 1414); (2) The Rhode Island Load Resistance Factor Design (LRFD) Bridge Design Manual (LRFD Manual) (Trial Ex. 1161); and (3) The American Institute of Steel Construction (AISC) Specification for Structural Steel Buildings (AISC Guidelines) (Trial Ex. 2614). *See, e.g.*, Trial Tr. 44:17-23, Nov. 21, 2019; Trial Tr. 50:3-6, 58:3-10, Nov. 1, 2019; Trial Tr. 3:22-4:2, Nov. 4, 2019; Trial Tr. 9:7-10, 35:3-15, Nov. 5, 2019.

Credible expert testimony also demonstrates that industry standards only provided for increases in the allowable stress levels in temporary structures, not permanent structures. (Trial Tr. 54:17-24, 59:4-7, Feb. 18, 2020.)

3

Submittal of Design for the Marine Cofferdam for Piers 4, 5, and 6

The Shop Drawing SD-237-Submittal for Marine Cofferdam Piers 4, 5, and 6 was given to RIDOT by Cardi on December 1, 2009. *See* Trial Ex. 1308. The submission required three

revisions before RIDOT gave it final approval. (Trial Exs. 1308, 1309, 1310, 1311.) Multiple submissions are not uncommon in large, complex, and unique projects, such as the design of the marine cofferdams for this Project. (Trial Tr. 69:3-9, 75:9-13, Nov. 4, 2019; Trial Tr. 18:11-19:1, Jan. 24, 2020.)

Throughout the design vetting process, Commonwealth and H&A prepared comments regarding the drawings and calculations of the design. *See* Trial Ex. 1308, at 7-13; Trial Ex. 1309, at 13-20. For instance, H&A requested that Cashman provide information demonstrating that its personnel assigned to the Project met the qualification requirements for pipe pile driving. (Trial Ex. 1308, at 13; Trial Tr. 22:7-17, Nov. 1, 2019.) Other qualification material requested included a demonstration that Cashman and its supervisory personnel had "a minimum of 10 years of relevant Marine Cofferdam construction experience" and had "successfully constructed a minimum of 3 similar Marine Cofferdams." *See* Trial Ex. 1308, at 13; Trial Ex. 1162, at JS-107; *see also* Trial Tr. 52:20-53:9, Nov. 4, 2019. In addition, RTG was asked to "document[] [its] relevant design and construction experience." *See* Trial Ex. 1162, at JS-107; Trial Tr. 40:4-15, Nov. 1, 2019. This encompassed documenting "a minimum of 10 years of relevant marine design experience" as well as having "designed at least 5 similar Marine Cofferdams." *See* Trial Ex. 1162, at JS-107; Trial Tr. 40:4-15, Nov. 1, 2019.

The experience of the teams at RTG and Cashman in their respective fields was ultimately recognized as being sufficient to support a recommendation to accept their qualifications, and they were approved.[15] (Trial Tr. 63:8-66:17, Nov. 4, 2019; Trial Tr. 70:17-71:19, 72:9-73:5, Nov. 5,

[15] After receiving the documents outlining RTG and Cashman's relative experience, H&A stated that it had "no further comment on the Contractor's qualifications." (Trial Ex. 1410, at 8.)

2019; Trial Ex. 1410, at 8.) Therefore, RIDOT determined that they were qualified to undertake the Project. (Trial Tr. 65:14-19, Nov. 4, 2019.)

F

Construction Process

1

On-Site Participants

RIDOT, Cardi, and Cashman had various representatives on-site during the Project construction, each with their own duties and responsibilities.

RIDOT's representative on-site during the construction was their resident engineer, Michael Studley (Mr. Studley). (Trial Tr. 7:9-17, 64:3-6, Nov. 1, 2019.) As a resident engineer, Mr. Studley was responsible for ensuring that the bridge structure was being constructed in accordance with the plans and specifications of the Prime Contract.[16] *See id.* at 7:17-21. Engineering technicians Paul Williams (Mr. Williams) and Anthony Weaver (Mr. Weaver) were also present on-site. (Trial Tr. 44:9-11, Nov. 15, 2019; Trial Tr. 103:1-5, Nov. 5, 2019; Trial Tr. 4:14-16, Nov. 6, 2019.) The role of an engineering technician is to observe the construction work on-site. (Trial Tr. 104:1-3, Nov. 5, 2019.) The engineering technicians documented their respective observations in daily activity reports and photographs. *Id.* at 106:6-11. These reports and photographs were submitted daily to Mr. Studley for his review. (Trial Tr. 6:7-25, Nov. 6, 2019.)

[16] According to the Blue Book, the role and authority of the "Resident Engineer," is more limited than that of the "Engineer" at RIDOT. *See* Trial Ex. 1501, at § 105.09. The Blue Book states that "[t]he Resident Engineer is not authorized to make changes in any design element or project specification; or to make increases or decreases in quantities greater than ten-percent of the corresponding values that appear in the Proposal." *Id.*

Paul Grimaldi (Mr. Grimaldi) of Cardi was the superintendent of the Project. He was responsible for all aspects of construction in the field, including the personnel and equipment used on the Project. (Trial Tr. 75:6-11, Nov. 7, 2019.)

Mr. McNulty served as the project manager for Cashman. He was responsible for ensuring that Cashman performed its work on time, on budget, and in accordance with all contract documents, including the approved marine cofferdam plans. (Trial Tr. 54:15-55:23, Dec. 3, 2019.) Additionally, he had a duty to inspect Cashman's work to ensure it complied with the approved marine cofferdam design. *Id.* at 57:24-58:3. Mr. McNulty's duty to inspect included a duty to inspect the materials used during the construction of the marine cofferdams. (Trial Tr. 3:17-22, Dec. 4, 2019.)

Richard Savoy (Mr. Savoy), a contractor with thirty years' experience in marine construction, was Cashman's project superintendent. (Trial Tr. 5:15-25, Nov. 18, 2019.) Mr. Savoy supervised the construction of the cofferdams and "managed all the labor on the site, the materials procured, the proper equipment to do the job, [and] procedures to do the job." *Id.* at 5:23-6:2. Mr. Savoy was also charged with the inspection of Cashman's work to ensure that it was completed in accordance with the Project specifications, including the specifications for the approved marine cofferdam design. (Trial Tr. 57:24-58:10, Dec. 3, 2019.)

2

Field Modifications

The construction of the marine cofferdams was required to be in strict conformance with the provisions of the RIDOT-approved plans and specifications. *See* Trial Ex. 5273; *see also* Trial Ex. 1501, at §§ 105.02, 108.06. Any structural deviation from the approved plans required prior written approval from RIDOT. (Trial Tr. 66:17-21, Nov. 1, 2019; Trial Tr. 103:4-23, Nov. 4,

2019.) Cardi controlled the dissemination of all information, including all communications between Cardi, Cashman, RTG, and RIDOT. (Trial Tr. 2:8-12, Dec. 4, 2019.) RTG was responsible for providing all marine cofferdam submittals to Cashman. *Id.*; Trial Tr. 57:25-58:3, Jan. 22, 2020. It was understood that Cashman would then forward these submittals to Cardi, who would submit them to RIDOT. (Trial Tr. 57:25-58:5, Jan. 22, 2020; Trial Tr. 2:8-16, Dec. 4, 2019 (Mr. McNulty testifying the same).) Once submitted to RIDOT, the project engineer would distribute the shop drawings and computations to Commonwealth. (Trial Tr. 8:21-9:1, Nov. 1, 2019.) Commonwealth was then tasked with performing a detailed review of the "structural aspects" of the marine cofferdam design submittals, as well as coordinating with H&A to perform its review of the submittals. (Trial Tr. 6:17-23, Nov. 5, 2019.) In the event that RIDOT required additional information, they would notify RTG. (Trial Tr. 119:11-14, Jan. 23, 2020.) It was also Cashman's responsibility to notify Cardi of any issues RTG brought to its attention regarding the Project. (Trial Tr. 78:12-21, Jan. 29, 2020.) This procedure eliminated duplication and streamlined the submittal process. *Id.*

On occasion, field conflicts, which happen on-site or "in [the] field," can occur when one element of a plan conflicts with another element of the plan, creating a potential constructability issue. *See* Trial Tr. 122:10-19, Nov. 4, 2019. These issues are usually addressed either through the initiation of a Request for Information (RFI) by the contractor or by a modification to a shop drawing. *Id.*; Trial Tr. 66:18-68:17, Nov. 1, 2019.

Insignificant or minor deviations are rare. (Trial Tr. 68:11-12, Nov. 1, 2019.) A minor change or a "fit up" issue is "something that would not affect safety or the intent of the design drawings." (Trial Tr. 103:19-21, Nov. 4, 2019; Trial Tr. 68:15-17, Nov. 1, 2019 ("[The minor change] wouldn't have anything to do with … structural stability or compromise, any type of safety

issue that could possibly go wrong if the change were … made.").) Such minor changes are handled verbally. (Trial Tr. 88:12-17, Jan. 24, 2020.)

Mr. McNulty recognized these procedures but understood that *all* changes, including "minor change[s]," to the approved cofferdam plans required approval by RIDOT. (Trial Tr. 85:6-10, Dec. 3, 2019; Trial Tr. 4:18-21, 15:16-16:7, Dec. 4, 2019.) Notwithstanding this, Mr. McNulty testified that he would instead seek approval from Mr. Otten, as the "engineer of record," for modifications, such as "fit-up issues in the field." (Trial Tr. 15:23-16:10, Dec. 4, 2019.) Mr. McNulty admitted that he knew that RIDOT required written approval prior to performing any modifications to the Project. *Id.* at 16:11-19. Thus, Mr. McNulty was aware that any modification to any aspect of the plan or the performance of any work that was not in strict accordance with the approved marine cofferdam plans required a written submittal to be approved by RIDOT.[17] *Id.* at 33:3-7.

3

Deviations from the Approved Cofferdam Plans

Despite understanding that they were not to deviate from the approved marine cofferdam plans without prior written authorization from RIDOT, Cashman consistently and routinely deviated from the marine cofferdam plans and specifications. In fact, this Court previously concluded that the "record is riddled with evidence of unauthorized modifications that were brought to Cashman's attention by Cardi, after notice to them, by RIDOT throughout this [P]roject." (Trial Tr. 6:24-7:2, Feb. 18, 2020.)

[17] "[DEFENDANT'S COUNSEL]: [Y]ou understood, from prior letters and including this one, that you could not perform work that varied from the marine-cofferdam submittal without RIDOT's approval, correct, sir?

"[MR. MCNULTY]: Correct." (Trial Tr. 33:3-7, Dec. 4, 2019.)

Cashman's lack of compliance with the express terms and conditions of the marine cofferdam plans during the construction was a clear source of frustration to RIDOT. (Trial Tr. 104:19-20, Nov. 15, 2019.) Such frustration was expressed in an email dated August 17, 2010. In that email, Mr. Studley described Cashman's disregard of the approved plans during the construction process and opined that Mr. McNulty "operate[d] as he please[d] . . . and I for one have about had enough." (Trial Ex. 1751, at 3; Trial Tr. 104:11-18, Nov. 15, 2019.)

In addition, the credible evidence has documented that Cashman modified "almost every component of the marine cofferdam system[.]" (Trial Ex. 620, at 10 (RTG concluding following the dive report).) In fact, in a January 6, 2011 letter to Cardi, RTG stated that Cashman's actions were "a blatant disregard to the design and submittal review & approval process, or a complete breakdown in supervision and control at the project level" and that "[t]he unauthorized changes made by [Cashman] are not theoretical problems or issues[;] they are real, and they will be very difficult to address and remedy." *Id.* Furthermore, Mr. Russell credibly testified that in his thirty years of working with contractors, he "had never seen anything like this before." (Trial Tr. 120:7-9, Jan. 27, 2020.) The credible evidence clearly establishes that the deviations made by Cashman affected the structural integrity of the marine cofferdams. (Trial Ex. 2330, at 2-3.)

a

Discovery of Deviations, Peer Review, and Dive Inspections

It is also clear that, from the Project's inception, Cashman acted as its own engineer. *See* Trial Tr. 127:1-20, Jan. 23, 2020.[18] Cashman's deviations were continuous, routine, and noted

[18] At trial, this testimony was challenged. (Trial Tr. 127:5-8, Jan. 23, 2020.) This Court denied a motion to strike, stating that it would give the contested testimony that Cashman acted as its own engineer "the weight it deserves." *Id.* at 127:10-11. The witness, Mr. Russell, then clarified his statement, saying that when a contractor makes an evaluation that would otherwise be the province of an engineer, it means that the contractor themselves "engineered it[.]" *Id.* at 127:15-20.

throughout the Project. *See, e.g.*, Trial Exs. 271, 620, 1701. Cashman, as a skilled and experienced contractor, unmistakably understood that it was proceeding at its own risk. *See* Trial Tr. 19:19, Dec. 4, 2019. Credible evidence, including photographs introduced at trial, cement the fact that the work furnished by Cashman was not in strict conformity with either the provisions of the Subcontract or the approved plans. *See, e.g.*, Trial Exs. 1473, 271, 620; Trial Tr. 116:12-16, Feb. 4, 2020. Examples of Cashman's errant behavior are woven into the very fabric of this trial record. *See id.*

At the inception of the Project, RIDOT notified Cardi of the earliest deviations. *See* Trial Ex. 1661. For example, on May 12, 2010, RIDOT informed Cardi by letter of several deviations and requested that Cardi's "engineer of record address these concerns and respond in writing." (Trial Ex. 271, at 1-2.) In other instances, Mr. Studley emailed Mr. McNulty directly. *See* Trial Ex. 1701, at 1.

One notable deviation, which will be described in more detail below, related to the hanger brackets at Piers 4, 5, and 6. *See* Trial Ex. 1473, at 3; Trial Tr. 114:16-117:16, Feb. 4, 2020. The discovery of this deviation led to an October 18, 2010 meeting between RTG, Cardi, Cashman, RIDOT, and Commonwealth. (Trial Tr. 103:22-24, Dec. 2, 2019; Trial Ex. 399 (Meeting Agenda); Trial Ex. 397 (Meeting Minutes).) As a result of the extensive deviations discussed at the meeting, construction on the Project ceased until RTG could complete its analysis of the effect of the altered hanger brackets. (Trial Ex. 5261; Trial Ex. 397, at 2.)

On October 21, 2010, Mr. Russell forwarded to Cardi and Mr. McNulty a draft "re-analysis" of the hanger brackets and recommended that "the re-analyses be scrutinized as part of a formal peer review . . . ." (Trial Ex. 5264, at 1.) Cashman then retained Simpson Gumpertz and

Heger (SGH) to conduct the peer review.[19] (Trial Tr. 3:24-5:6, Dec. 3, 2019.) On October 29, 2010, Cashman advised Cardi of SGH's preliminary analysis showing "that the loads on the [hanger brackets] looked to be three to five times greater than the loads calculated by [RTG.]" (Trial Ex. 5267, at 3.)

SGH issued its first report on November 15, 2010. *See* Trial Ex. 428. SGH analyzed the "as-designed bracket," a "worst-case condition of the bracket with the outer ring completely removed," and a bracket "with the outer ring completely removed but with five topside stiffeners[.]" (Trial Tr. 66:5-13, Feb. 6, 2020; *see* Trial Ex. 428, at 1-5.) The report concluded that the as-designed hanger brackets, the as-built hanger brackets, and the as-built hanger brackets with the suggested stiffener repair all exceeded the allowed stress. (Trial Ex. 428, at 4-5; Trial Tr. 152:17-23, Feb. 10, 2020.)

On December 15, 2010, SGH issued a second peer review report, analyzing the cofferdam framing system, including the "precast, the steel girders, the hanger rods . . . , the float-in form sections . . . and components at the top of those elements that brace the tops of the float-in forms." (Trial Tr. 105:4-9, Feb. 6, 2020; Trial Ex. 522.) SGH concluded that (1) the calculations RTG used in their analysis of the support between the float-in form and the upright at the end of the girders was "unconservative"; (2) the girders were "not adequately braced at their support points"; (3) the "combined effect of tension and shear on the [hanger] rods has not been evaluated[,]" and it would be "unrealistic" to rely on the rods "to resist twisting of the girder-end-wall supports"; (4) more calculations were needed as to the "unbraced length of the girders and resulting bending capacity"; (5) RTG needed to "fully evaluate the stresses on the hanger rods"; (6) the bending

[19] SGH's principal, William Konicki (Mr. Konicki), was responsible for the peer reviews. *See* Trial Tr. 8:3-22, Feb. 6, 2020. Mr. Konicki later testified as an expert witness for Cashman. *See id.*

stress in the W40 beam bottom flange "significantly exceeds the allowable bending stress"; and (7) RTG's girder calculations "do not include a capacity check or details for the splice connecting" W40 sections. (Trial Tr. 106:10-22, 106:25-107:1, 108:13-18, 110:7-17, 112:19-24, Feb. 6, 2020; Trial Ex. 522, at 8-9.) At the conclusion of the second peer review, SGH provided several recommendations, which, the report stated, "need[ed] to be confirmed and/or addressed prior to loading the structure." (Trial Ex. 522, at 9-10.)

RTG also recommended that an underwater dive inspection be completed on the marine cofferdams to "assess the actual installed conditions at each cofferdam location." (Trial Ex. 1895, at 1.) On December 9, 2010, Cardi responded in writing, demanding that Cashman "immediately make arrangements to perform the underwater video dive inspections as recommended in" RTG's letter. (Trial Ex. 1901, at 1.) Thereafter, RTG and SGH each created a "checklist" for the scheduled dive inspections, with the plan that the two checklists would "combine into one master checklist." (Trial Ex. 544, at 5.) The dive inspections were performed on December 21, 22, and 23, 2010. (Trial Exs. 556, 565, 577; Trial Tr. 91:7-92:19, Jan. 6, 2020.)

On January 6, 2011, RTG sent Cardi a dive report, which concluded that "based on an inspection of only 30 percent of the piles at each pier," Cashman had "made unauthorized modifications to almost every component of the marine cofferdam system[.]" (Trial Ex. 620, at 10.) This finding caused grave concern to RTG because it clearly indicated that Cashman "may have made other unauthorized modifications that are currently unknown." *Id.* RTG then recommended that an underwater dive inspection be performed for the remaining 70 percent of the piles. *Id.* On February 11, 2011, SGH, acting on behalf of Cashman, issued a response report "[a]s requested" by Mr. McNulty, which concluded that although "several components require

correction to comply with the design drawings[,]" the approved cofferdams also had "numerous design issues that need to be resolved." (Trial Ex. 715, at 1, 6.)

Following a dive inspection of the remaining 70 percent of the piles, RTG issued a second dive inspection report on February 22, 2011. (Trial Ex. 757.) In that report, RTG concluded that all pile locations contained "unauthorized modifications." *Id.* at 22. RTG referred to repairs proposed a few days earlier in an attempt to remedy the unauthorized modifications. *Id.* (citing Trial Ex. 750). Additional deviations were discovered while the repairs were being made. *See* Trial Ex. 2208. On May 11, 2011, RTG sent Cardi a letter detailing the newly discovered, unauthorized modifications. *Id.*

b

Hanger Bracket Deviations

RTG's design of the marine cofferdams included two hanger brackets that were intended to be installed at each pile in the marine cofferdams. *See* Trial Ex. 1311. Each bracket consisted of a curved top plate, an inner ring meant to sit inside the pile, and an outer ring sitting outside the pile. *Id.* The two rings were to "allow placement of the bracket in a snug 'monkey wrench' fit over the top of each pile." (Trial Ex. 2330, at 12.) Each bracket was also meant to contain eight "stiffeners."[20] (Trial Ex. 1311.) Over the course of the project, several deviations to the approved hanger bracket plans were discovered.

[20] Cashman's fabricator for the hanger brackets, Raymond Piling Products, produced a shop drawing demonstrating only six stiffeners on each hanger bracket; this was consistent with the initial submittal but did not conform with the revisions to the plans, which added two stiffeners. *See* Trial Exs. 1308, 1311; *see also* Trial Tr. 62:1-14, 71:5-14, Oct. 31, 2019. Mr. Otten reviewed and approved the fabricator's shop drawing with the six stiffeners. *See* Trial Ex. 1312, at 5.

i

Full Removal of the Hanger Brackets' Outer Rings

During the construction of the marine cofferdams, "issues" arose with fitting the brackets on top of the piles.[21] (Trial Tr. 92:19-24, Oct. 31, 2019.) Mr. McNulty and Mr. Otten commenced discussions regarding a potential solution. (Trial Tr. 36:24-37:4, Dec. 2, 2019; Trial Tr. 114:16-21, Feb. 4, 2020.) Mr. Otten believed that Mr. McNulty's concerns about the brackets involved mere "fit-up" issues that could be handled verbally and did not require any further calculations. (Trial Tr. 116:21-117:5, Feb. 4, 2020.)

Although the testimony regarding the conversations and resolution of this construction issue diverge, it is clear to this Court that Mr. Otten did authorize the trimming of the outer rings of the hanger brackets. *See* Trial Tr. 114:22-115:2, Feb. 4, 2020. It is also clear, and the credible testimony establishes, that Cashman was never authorized to remove the outer rings of the hanger brackets entirely. *See* Trial Ex. 1473, at 3; Trial Tr. 115:3-116:16, Feb. 4, 2020; Trial Tr. 37:7-9, Dec. 2, 2019. Mr. Savoy, who was also advised of the authorization to trim the outer rings, reasonably believed that trimming meant doing "as little modification as you can to make them work." (Trial Tr. 48:13-19, Nov. 18, 2019.)

The Court accepts Mr. Otten's testimony that he advised Mr. McNulty to limit the trimming to the edge of the stiffeners because he "knew the importance of the stiffeners in the whole, overall performance of the bracket." (Trial Tr. 115:3-14, Feb. 4, 2020.) Furthermore, the stiffeners had to

[21] "[MR. MCNULTY]: I couldn't tell you exactly why it won't fit over, but it would not fit over the pile." (Trial Tr. 92:23-24, Oct. 31, 2019.)
"[MR. SAVOY]: There were issues with the fitting [of the hanger brackets] onto the top of the piles." (Trial Tr. 46:11-12, Nov. 18, 2019.)

bear against that ring, and then against the pile, which braced the bracket. *Id.* at 115:3-9; *see* Trial Tr. 128:15-16, Jan. 30, 2020.

Further buttressing the trial record are the photographs from a RIDOT daily report, dated June 16, 2010, which clearly indicate that Cashman had removed the outer rings. *See* Trial Ex. 1473, at 3; *see also* Trial Exs. 1748, 5005 (activity report with pictures depicting the brackets without outer rings). In fact, the record is replete with credible evidence revealing extensive and aggressive modifications that resulted in the complete removal of the outer ring.[22] (Trial Ex. 1473, at 3; Trial Tr. 116:1-14, Feb. 4, 2020.) The photographs indicate actions taken that were diametrically opposed to trimming, as understood by Mr. Otten. *See id.* Cashman removed both the outer edges and the center of the ring, which, according to all credible accounts, impacted the structural safety of the marine cofferdam. (Trial Tr. 116:12-16, Feb. 4, 2020; Trial Tr. 119:22-120:8, Feb. 11, 2020; Trial Ex. 2330, at 21-23.) To compound matters, Cashman did not maintain records of these modifications. (Trial Tr. 110:10-12, Dec. 2, 2019.)

The modification of the outer rings was not discussed with Mr. Russell until October 9, 2010. (Trial Tr. 111:9-112:4, Jan. 22, 2020; Trial Ex. 382.) During this conversation, Mr. Russell inquired about the installation of the hanger brackets and, in his telephone log of the conversation, Mr. Russell wrote that Mr. McNulty said, "[H]e needed to cut out the . . . outer . . . ring." (Trial Ex. 382.) Mr. Russell testified that, before the phone call, he had "heard about the trimming of the hanger brackets" from Mr. Otten. (Trial Tr. 112:21-23, Jan. 22, 2020.) Mr. Russell then stated that, based on his phone call with Mr. McNulty, he believed that the entire outer ring had been removed, and he "wanted to go to the site to investigate if that was the case[.]" *Id.* at 114:13-17.

[22] At the time of his testimony, Mr. Otten was testifying about an exhibit numbered 2581. However, during Mr. Russell's testimony on January 27, 2020, it was discovered that Exhibit 2581 was already included in a full exhibit, Exhibit 1473. (Trial Tr. 108:19-21, Jan. 27, 2020.)

Mr. McNulty assured Mr. Russell "that only a portion of the outer ring had been removed." *Id.* at 114:18-20. However, at the time he made this assurance to Mr. Russell, Mr. McNulty knew that the outer rings had been entirely removed from all of the hanger brackets. *See id.*; *see also* Trial Ex. 1473, at 3; Trial Ex. 5005.

Mr. Otten, Mr. Russell, and Mr. McNulty met on-site on October 11, 2010. (Trial Tr. 113:23-114:7, Jan. 22, 2020; Trial Tr. 100:1-8, Dec. 2, 2019.) As of this date, the rebar mat on Pier 6 had not been placed, so there was still the "option" for the grout to be removed, using a jackhammer, so that the hanger bracket at Pier 6 could be examined. (Trial Tr. 114:21-115:1, 116:6-12, Jan. 22, 2020.)

Based on the site visit, Mr. Russell "thought it would be prudent" to cease work until a thorough analysis of the hanger bracket could be completed. (Trial Tr. 118:5-11, Jan. 22, 2020.) Operating without firm knowledge of what exactly was removed, Mr. Russell competently and correctly instructed Mr. Otten to perform calculations to "evaluate whether or not the hanger would still perform if the outer ring had been removed[.]" *Id.* at 117:24-118:2.

These extensive modifications to the hanger brackets were confirmed during the October 18, 2010 meeting between Cardi, Cashman, RTG, RIDOT, and Commonwealth. *See* Trial Ex. 397. A photograph presented at the meeting "showed the entire outside ring being cut off" of the brackets at "either [P]ier 4 or [P]ier 5." (Trial Ex. 397, at 2.) Mr. Studley, who was present at the meeting, credibly testified that Mr. Russell "looked surprised" when he was presented with the photograph. (Trial Tr. 29:5-15, Nov. 19, 2019.) Mr. Russell himself testified that he was "flabbergasted" when he saw the photo. (Trial Tr. 149:7-15, Jan. 24, 2020.) The removal of the outer rings resulted in a critical modification of the plans and specifications, which had a

significant impact on the structural integrity of the marine cofferdam, thus resulting in a necessary work stoppage. (Trial Tr. 115:5-13, Feb. 4, 2020; Trial Ex. 2330, at 21-23.)

ii

Other Hanger Bracket Deviations

Several RIDOT daily reports and photographs dated as early as June 16, 2010 also demonstrate that Cashman deviated from the authorized design plans when it elongated the holes of the hanger brackets' top plates. *See, e.g.*, Trial Ex. 1290A; Trial Ex. 1473, at 3; Trial Tr. 58:10-18, Dec. 2, 2019 (Mr. McNulty testifying that in Exhibit 1473, a Cashman worker was "elongating the hole" because "there was no tolerance built into the design, so we needed that tolerance to get the rods through the hanger bracket"). Credible testimony from Mr. Russell demonstrated that elongating the holes impacted the hanger bracket because it was "removing steel" and "weakening the section." (Trial Tr. 95:2-7, Jan. 24, 2020.) The elongation of the hole created the possibility that "the standard washer and nut" could "pull through that elongated hole," and if it pulled through, there would be a "catastrophic failure potentially." *Id.* at 95:8-12.

Additionally, Cashman performed unauthorized welds on "20 pipe piles at [P]iers 5 and 6." (Trial Ex. 1741, at 1.) The welding on the twenty pipe piles at Piers 5 and 6 did not conform with welding code AASHTO/AWSD 1.5, Section 3.1.5. *See id.* Specifically, the welds that were installed were not detailed on the approved shop drawings. *Id.* These unauthorized welds were addressed in an August 10, 2010 letter from RIDOT to Cardi. *Id.* at 1, 3. Mr. McNulty explained that the unauthorized welds were added "as a redundant hold down method for the uplift loads of the cofferdams." (Trial Ex. 1745, at 2.) Mr. Russell and Mr. Otten concluded that there was sufficient concrete to obviate the concern but supported Mr. McNulty's response to RIDOT. (Trial Tr. 124:16-21, Jan. 30, 2020.)

c

Cofferdam Frame Deviations

i

Beam-Related Deviations

On May 12, 2010, RIDOT notified Cardi of "concerns that were noted during an inspection of the onsite fabrication of the marine cofferdam at [P]ier 6." (Trial Ex. 271, at 1.) Specifically, certain beams were "scabbed"[23] together, which was "not in conformance with the approved shop drawings." *Id.* This action could have "severely compromise[d] the structural capacity of that beam." (Trial Tr. 123:22-24, Jan. 23, 2020.) As a result of this unauthorized deviation, RTG was required to perform further calculations to demonstrate the structural integrity of the beams. (Trial Ex. 271, at 2; Trial Tr. 124:5-9, Jan. 23, 2020.)

The May 12, 2010 letter also noted the reconfiguration of the cofferdam beams by attaching a vertical brace at the top flange. (Trial Ex. 271, at 1.) Again, the deviation was "not in conformance with the shop drawing." *Id.* At RIDOT's insistence, RTG was asked to check whether the vertical brace was sufficient to support the intended loads. (Trial Tr. 130:6-9, Jan. 23, 2020.)

During the dive inspections, several other beam-related deviations were discovered. For example, the beams were not installed flush against the piles. *See* Trial Ex. 715, at 4; Trial Ex. 1311, at Sheet 5; Trial Ex. 620, at 2, 4-9; Trial Ex. 757, at 2-12, 14-21. Gaps existed between the precast panels and the steel beams. *See* Trial Ex. 620, at 9; Trial Ex. 757, at 22; Trial Ex. 715, at 4. The beam flanges were "scalloped." *See* Trial Ex. 620, at 8-9; Trial Ex. 757, at 18, 21; Trial Tr.

[23] "Scabbing" refers to the process of welding two pieces of a beam together. (Trial Tr. 113:10-12, Jan. 30, 2020.)

127:12-15, 133:22-134:1, Jan. 27, 2020. There were unpatched holes in the beams. *See* Trial Ex. 2208, at 13; Trial Ex. 620, at 5, 8-9; Trial Ex. 757, at 14, 16, 18; Trial Tr. 116:10-12, Jan. 28, 2020. The beam stiffeners were also missing. *See* Trial Ex. 620, at 2, 4, 6; Trial Ex. 757, at 4, 6, 9-11, 14-15; Trial Ex. 715, at 5. Additionally, there were a number of deviations to the W21 beams. *See* Trial Ex. 2208, at 2-14; Trial Tr. 128:5-129:25, Jan. 23, 2020.

ii

Gusset Removal

Cashman also removed or modified the beam-bracing gussets. *See* Trial Ex. 2577; Trial Ex. 620; Trial Ex. 757; Trial Tr. 101:7-12, Oct. 31, 2019. These gusset plates were meant to brace the beam against the piles and prevent the beams from rotating under a load. (Trial Tr. 64:3-15, Jan. 24, 2020.) Rotation of the piles could cause instability in the entire structure. (Trial Tr. 64:2-22, Feb. 11, 2020; Trial Tr. 66:25-67:6, Jan. 24, 2020.) According to Mr. Savoy, it had been necessary to trim the gussets to fit the piles. (Trial Tr. 102:3-6, Nov. 18, 2019.)

iii

Other Cofferdam Frame Deviations

Several other cofferdam frame-related deviations were discovered during the dive inspections. *See* Trial Ex. 620. For example, the rod holes were oversized and too close to the edge of the flange. *See* Trial Tr. 83:14-20, Feb. 11, 2020; Trial Ex. 2330, at 31; Trial Ex. 620, at 7; Trial Ex. 757; Trial Ex. 2592, at Slides 59 and 66; Trial Ex. 544, at 2; Trial Ex. 715, at 2. The hanger rods were torch cut. *See* Trial Tr. 40:4-13, Dec. 3, 2019; Trial Ex. 1311, at Sheet 4; Trial Tr. 125:6-25, Jan. 15, 2020. Additionally, the cover plates on the W30 beams were missing. *See* Trial Ex. 2208, at 11; Trial Tr. 81:13-17, Jan. 27, 2020; Trial Tr. 99:19-100:3, Dec. 3, 2019; Trial Tr. 53:9-54:11, Feb. 11, 2020; Trial Ex. 2330, at 32. Lastly, there were undersized and missing

components of the beam hardware, including washers, nuts, and bearing plates. *See* Trial Ex. 620, at 1-4; Trial Ex. 715, at 1-5; Trial Ex. 2592, at Slide 63, 65; Trial Tr. 56:19-57:15, Feb. 11, 2020; Trial Ex. 2330, at 31.

d

Tremie Concrete and Grout-Related Deviations

According to the dive inspection reports, deviations from the approved plans were also found related to the tremie concrete pour and grout wells. Specifically, the tremie slabs at Piers 4 and 5 were not the required thickness. *See* Trial Tr. 50:20-21, Dec. 2, 2019; Trial Ex. 462, at 1. Additionally, "junk" tremie concrete was contained within the grout wells. *See* Trial Ex. 911, at 2. Cashman also deleted the deep grout wells on the approved plans and added center pile brackets. *See* Trial Ex. 1311, at COMM03848; Trial Ex. 463, at 2.

e

Other Deviations

On April 8, 2010, prior to the approval of the marine cofferdam design plans,[24] Cashman commenced work on portions of the cofferdam frame. (Trial Ex. 1639; Trial Tr. 38:21-25, Nov. 15, 2019.) This action resulted in an April 13, 2010 correspondence from RIDOT reiterating that work commenced prior to approval of shop drawings was a violation of the contract provisions. (Trial Ex. 1661, at 2.)

Next, on June 21, 2010, Mr. Studley informed Mr. McNulty that he had observed Cashman cutting three piles at once, which was "clearly not in conformance with the designer[']s direction in the shop drawing." (Trial Ex. 1702, at 1; Trial Tr. 87:23-88:10, Nov. 15, 2019.) Mr. Studley

[24] The plans were approved by Commonwealth on April 19, 2010. (Trial Ex. 1410.) However, the transmittal of the submittal from RIDOT back to Cardi is dated April 30, 2010. (Trial Ex. 1311, at 1.)

demanded that Cashman either work in accordance with the shop drawings by cutting one pile at a time or obtain a stamped letter from RTG authorizing Cashman's revision to the approved procedure for cutting the piles. (Trial Ex. 1702, at 1; Trial Tr. 88:11-19, Nov. 15, 2019.)

RTG recommended to Cashman that "only one pile at a time be worked on as noted in the approved Submittal." (Trial Ex. 1710, at 4.) Significantly, the correspondence noted that the sole "exception" authorizing the simultaneous cutting of two piles was in tidal conditions. *Id.*; *see* Trial Tr. 37:15-20, Jan. 29, 2020.

During the dive inspections, two additional deviations were discovered. First, Cashman did not use the approved procedure to install the flexi-float form system. *See* Trial Ex. 1311, at Sheet 3; Trial Tr. 120:15-122:12, Jan. 23, 2020. Also, Cashman installed unapproved beams in Pier 4. *See* Trial Ex. 1311, at Sheet 5; Trial Ex. 715, at 2; Trial Ex. 2140, at 3; *see also* Trial Tr. 133:9-24, Jan. 23, 2020.

G

Resulting Repairs

After the October 18, 2010 meeting, where the photographs presented clearly demonstrated that the entire outer rings of the hanger brackets had been removed, RTG was asked to complete an analysis and present repair options for the marine cofferdams. (Trial Ex. 397, at 2.) RTG recommended a number of repairs, including concrete mini-beams (also referred to as "hanger beams") and using a "2-pour" process. (Trial Ex. 504; Trial Ex. 750.)

The mini-beam repair was submitted to RIDOT on December 3, 2010, and Commonwealth recommended its approval on December 16, 2010. (Trial Ex. 504.) The 2-pour repair and other repair proposals were submitted to RIDOT on February 16, 2011. (Trial Ex. 750.) On March 6, 2011, Commonwealth responded to the submittal, stating:

> "As this submittal represents repairs to the Contractor's temporary underwater cofferdam support system 1) for which a submittal had previously been reviewed, 2) for which we cannot quantify the repairs required and 3) which was constructed improperly, *we take no action. The Contractor shall ensure that the support system functions equal or better to the originally accepted design*." (Trial Ex. 749, at 3 (emphasis added).)

Ultimately, Cardi implemented all of the repairs contained in the submittal. *See* Trial Tr. 43:6-13, 138:18-25, Nov. 15, 2019; Trial Tr. 117:12-118:1, Jan. 15, 2020; Trial Tr. 60:10-11, Jan. 9, 2020; Trial Tr. 38:9-12, Jan. 8, 2020. Keith Catanzaro (Mr. Catanzaro) was Cardi's on-site representative during the repairs process. (Trial Tr. 117:12-118:1, Jan. 15, 2020.) Mr. Catanzaro credibly testified that all of the repairs were performed in accordance with the repair plans designed by RTG. (Trial Tr. 68:7-73:10, Jan. 9, 2020.)

H

Demands, Default, and Ultimate Removal of Marine Cofferdams

After the SGH findings, Cashman notified Cardi by letter dated October 29, 2010, that "any fix or modification to the design is outside of our scope of work as per the [Subcontract]." (Trial Ex. 1833, at 5.) Cardi immediately responded to the letter on November 2, 2010, and notified Cashman that their "acknowledgment that 'the modifications were not documented at the time,' and therefore were performed without the written approval of the Engineer, clearly places responsibility for any subsequent remedial work" on Cashman. (Trial Ex. 1835, at 1.) Additionally, on November 2, 2010, RIDOT notified Cardi that:

> "[RTG] informed [RIDOT] that [Cashman] had not installed the bottom exterior support ring of the hanger bracket which was detailed on the approved shop drawing for the marine cofferdam installation. As a result of this there was a possibility that the pile cap hanger plate could fail under the load of the concrete placement for the pile cap. Due to this concern [RTG] was proposing to add stiffeners to the top of the hanger plate to compensate for the piece that had been omitted by [Cashman].

> ". . .
> "This issue is a direct result of your subcontractor not performing work in accordance with approved shop drawings." (Trial Ex. 1838, at 2-3.)

Correspondence between Cardi and Cashman continued, constituting a number of letters. In each of its letters, Cardi reiterated to Cashman that the resulting repairs were Cashman's responsibility. (Trial Ex. 1844 (Cardi's November 5, 2010 letter) (stating Cashman was "solely responsible for the ramifications resulting" from Cashman's unauthorized modifications and it was Cashman's responsibility "to provide [Cardi] with [a] proposed procedure for rectification"); Trial Ex. 1862, at 2 (Cardi's November 16, 2010 letter) (stating "it is Cashman's responsibility to immediately provide a detailed procedure to rectify the unauthorized modifications made by you to the approved Marine Cofferdam design").) Cashman maintained that any fix or modification to the design was outside Cashman's scope of work pursuant to the Subcontract. (Trial Ex. 1857, at 2 (Cashman's November 15, 2010 letter); *see also* Trial Ex. 5358, at 2 (Cashman's November 18, 2010 letter) (stating that Cashman "asks that [Cardi] closely review the SGH report and forward it to RIDOT to help develop a plan to solve the inadequate approved design issue with the marine cofferdams").)

Finally, on December 2, 2010, Cardi informed Cashman that the concrete hanger beam repair was being finalized and that it would be implemented in the near future. (Trial Ex. 5364.) Cardi advised Cashman that "this alternative is necessitated by your unauthorized modifications . . . [and] we want to provide you with the opportunity to play an active role in the procurement and installation process." *Id.* Cardi requested Cashman's "response to this offer" by December 6, 2010. *Id.* Cashman elected not to be involved in the repair process; rather, it chose to "continue to play an active role in the review and correction process." (Trial Ex. 5365, at 2; *see also* Trial Ex.

1891 (Cashman's December 6, 2010 letter) (forwarding SGH's friction collar design and stating that Cashman "has and will continue to work with all parties to help resolve the design issue").)

Pursuant to the terms of the Subcontract, upon default, Cardi was permitted to terminate the agreement or allow the subcontractor to "continue the work in which event he and his sureties shall be liable to Contractor . . . for any actual damages suffered by the contractor . . . ." (Trial Ex. 1303, at 10.) In a letter dated December 8, 2010, Cardi elected to declare a formal default by Cashman and Western. (Trial Ex. 1899.) Cardi stated that the letter would "constitute a notice of default, a demand for damages and indemnity[.]" *Id.* at 1. Furthermore, notice was given that Cardi "stands ready to commence remedial measures to correct defective work performed by Cashman, unless immediate assurances are provided for the performance by Cashman of those remedial measures, at Cashman's sole cost and expense." *Id.* This letter did not contain termination language. *See id.* at 1-3.

In their December 8, 2010 letter, Cardi also made an additional demand of Western that Western "immediately advise Cardi . . . as to its intentions regarding the remedial work and damages at issue." *Id.* at 3. Cashman responded on December 14, 2010, "strongly suggesting that Cardi withdraw the [December 8, 2010] letter in its entirety." (Trial Ex. 5368, at 1.)

Correspondence between Cardi and Cashman continued until the marine cofferdams were removed in 2012. (Trial Ex. 2270 (Cardi's December 23, 2011 letter); Trial Ex. 2295.) Cardi's letters repeatedly stated that Cashman was "in default" and that Cashman was responsible for the remedial work due to its unauthorized modifications. *See, e.g.*, Trial Exs. 1954, 1966, 2005, 2036, 2270.

Finally, on December 23, 2011, Cardi sent a letter notifying Cashman that, due to Cashman's numerous refusals to perform work and demands for payment prior to the removal of

the marine cofferdams, Cardi would complete the removal. (Trial Ex. 2270.) In this letter, Cardi also stated that Cashman had been mistaken in a previous letter when it had stated that Cashman "had been terminated by Cardi" and clarified that the "December 8th letter . . . contains no termination language." *Id.* at 2.

Ultimately, Cardi removed the marine cofferdam frames. (Trial Tr. 46:3-7, 78:7-79:1, Nov. 8, 2019; Trial Tr. 137:6-10, Nov. 15, 2019.)

II

Standard of Review

Rule 52(a) of the Superior Court Rules of Civil Procedure states that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon[.]" Super. R. Civ. P. 52(a). Therefore, in a non-jury trial, "'[t]he trial justice sits as a trier of fact as well as of law.'" *Parella v. Montalbano*, 899 A.2d 1226, 1239 (R.I. 2006) (quoting *Hood v. Hawkins*, 478 A.2d 181, 184 (R.I. 1984)). In that role, the trial justice "'weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences.'" *Id.* (quoting *Hood*, 478 A.2d at 184). "Also, it is permissible for the trial justice to draw inferences from the testimony of witnesses, and such inferences, if reasonable, are entitled on review to the same weight as other factual determinations." *Rhode Island Mobile Sportfisherman, Inc. v. Nope's Island Conservation Association, Inc.*, 59 A.3d 112, 118 (R.I. 2013) (quoting *Cahill v. Morrow*, 11 A.3d 82, 86 (R.I. 2011)) (internal quotations omitted).

However, the trial justice "'need not engage in extensive analysis to comply with'" the requirement of Rule 52(a). *JPL Livery Services, Inc. v. State of Rhode Island Department of Administration*, 88 A.3d 1134, 1141 (R.I. 2014) (quoting *Connor v. Schlemmer*, 996 A.2d 98, 109 (R.I. 2010)). In fact, the "trial justice's analysis of the evidence and findings in the bench trial

context need not be exhaustive . . . if the decision reasonably indicates that [the trial justice] exercised [his or her] independent judgment in passing on the weight of the testimony and the credibility of the witnesses[.]" *Id.* (alteration in original) (quoting *Notarantonio v. Notarantonio*, 941 A.2d 138, 144-45 (R.I. 2008)).

Additionally, Rule 52(c) of the Rhode Island Superior Court Rules of Civil Procedure allows the Court, in a non-jury trial, to enter judgment as a matter of law after a party has been fully heard on an issue.[25] "[A] finding on a Rule 52(c) motion must comport with the requirements in Rule 52(a), which does not require extensive analysis and discussion of all the evidence presented in a bench trial." *Broadley v. State of Rhode Island*, 939 A.2d 1016, 1021 (R.I. 2008). Thus, "[j]udgment as a matter of law is appropriate 'if, after viewing the evidence in the light most favorable to the nonmoving party, [the trial justice] determines that the nonmoving party has not presented legally sufficient evidence to allow the trier of fact to arrive at a verdict in his favor.'" *McGarry v. Pielech*, 47 A.3d 271, 280 (R.I. 2012) (alteration in original) (quoting *Gianquitti v. Atwood Medical Associates, Ltd.*, 973 A.2d 580, 590 (R.I. 2009)).

[25] Rule 52(c) provides, in pertinent part:

> "If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule."

III

Analysis

A

Contract Claims

Cashman and Cardi have put forward a broad range of claims and counterclaims in this action. However, the true crux of the dispute involves competing contract claims stemming from the provision of engineering plans for the marine cofferdams at Piers 4, 5, and 6, and the deviation from those plans. Consequently, the Court will first analyze these contract claims before turning to the remaining claims at issue in this trial. Counts I and III of Cashman's Fifth Amended Complaint and Count I of Cardi's Counterclaim will be addressed under one umbrella because of their many overlapping elements.

1

Contract Law

It is fundamental that to succeed on a claim for breach of contract, a party "must prove both the existence and breach of a contract, and that the defendant's breach thereof caused the plaintiff's damages." *Fogarty v. Palumbo*, 163 A.3d 526, 541 (R.I. 2017). Furthermore, "[a] party's material breach of contract justifies the nonbreaching party's subsequent nonperformance of its contractual obligations." *Women's Development Corp. v. City of Central Falls*, 764 A.2d 151, 158 (R.I. 2001). Materiality is an issue of fact. *Id.* Our Supreme Court has said that "[d]etermining the legal threshold for 'materiality' is 'necessarily imprecise and flexible.'" *Id.* (quoting Restatement (Second) *Contracts* § 241 cmt. a at 237 (1981)). Moreover, a court considers the following factors in determining whether a breach is material:

> "(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

> "(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> "(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
> "(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
> "(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing." *Id.* (quoting Restatement (Second) *Contracts* § 241 cmt. a at 237).

In addition, a claimant must demonstrate that the breach is "a substantial or primary cause" of the claimant's injuries. *Wells v. Uvex Winter Optical, Inc.*, 635 A.2d 1188, 1191 (R.I. 1994). "'There is . . . a fundamental requirement, similar to that imposed in tort cases, that the breach of contract be the cause in fact of the loss, although the presence of other contributing causes may not preclude recovery.'" *Id.* (quoting 3 E. Allen Farnsworth, *Farnsworth on Contracts*, § 12.1 at 148 (1990)).[26]

In the construction law context, "an owner is entitled to have a structure built in keeping with contract specifications which govern the work, and . . . a departure from those specifications—absent the consent of the owner or his authorized agent, or a waiver—will render the contractor liable for the necessary cost of bringing the structure into compliance with the specifications." *Havens Steel Co. v. Randolph Engineering Co.*, 613 F. Supp. 514, 528 (W.D. Mo. 1985), *aff'd*, 813 F.2d 186 (8th Cir. 1987). A contractor may still be liable for a breach based on deviation from specifications "even though the specifications were defective, or the deviation otherwise results in a better or more valuable piece of work." *Id.*

[26] Cardi argues that this Court should dismiss Cashman's request to apply "contort" principles to this case because (1) this is a contract case that can be decided under well-established law; (2) contribution among tortfeasors does not apply; and (3) the economic loss doctrine applies to bar recovery in tort. (Cardi's Post-Trial Br. 517-18.) As the Court has stated *supra*, the primary claims at issue sound in contract law and this Court will therefore decline to apply "contort" principles.

2

Analysis

The Court is required to and will analyze each claim individually. Notwithstanding this requirement, the Court's initial inquiry requires the dissection of three critical questions permeating throughout this matter: (1) did Cashman materially breach the Subcontract by deviating from the plans without approval or consent; (2) did Cardi provide Cashman with defective plans; and (3) are Cardi's damages caused by the deviations or the defective plans? The Court will determine the answers to each of these questions in turn.

a

Breach of Contract

In Count I of its Fifth Amended Complaint, Cashman alleges that Cardi breached the Subcontract by failing to pay the balance of the contract price for work completed by Cashman. (Fifth Am. Compl. ¶¶ 192-198.) Cardi argues that this claim fails because it was relieved of any duty to perform the contract when Cashman (1) materially breached the contract by deviating from the plans in a way that affected the structural components of the cofferdam and (2) abandoned and materially breached the contract by failing to remove the cofferdam frames. (Cardi's Post-Trial Br. 493-94.)

When a party materially breaches a contract, this breach "justifies the nonbreaching party's subsequent nonperformance of its contractual obligations." *Women's Development Corp.*, 764 A.2d at 158; *see also Jakober v. E.M. Loew's Capitol Theatre, Inc.*, 107 R.I. 104, 112, 265 A.2d 429, 434 (1970) (quoting *Graves v. White*, 87 N.Y. 463, 465 (1882)) ("[T]he refusal of one party to perform his contract amounts on his part to an abandonment of it."). The parties agree that there remains an unpaid balance on the Subcontract in the amount of $2,389,295.80. *See* Joint Stip.

Regarding the Monetary Amount of the Contract Balance Owed by Cardi to Cashman, Dec. 3, 2019. Therefore, Cashman's success on this claim is contingent upon the Court's determination regarding Cashman's material breach of the Subcontract.

The credible record evidence overwhelmingly demonstrates that several as-built components of the marine cofferdams did not conform to the plans prepared by RTG for Cardi and approved by RIDOT. *See* Trial Exs. 271, 620, 715, 757, 2208. Cashman, however, challenges its liability on the basis that the modifications were authorized or accepted, or that the deviation did not "ris[e] to the level of a material breach." (Cashman's Post-Trial Br. 176-77.) A primary determination must therefore be made as to whether these deviations from the contract were authorized or accepted.

i

Deviations Approved or Authorized

Cashman may avoid liability for its deviations from the plans if it demonstrates that Cardi and/or RIDOT authorized or accepted the changes. *See Havens Steel Co.*, 613 F. Supp. at 528. Cashman argues that "[a]ll of the field modifications were necessitated by Otten's failure to account for Project tolerances contained within the Project Specifications in [Mr. Otten's] engineering plans[,]" and that Mr. Otten approved such modifications verbally "in order that the steel support frame could be assembled and the hanger brackets could be placed over the piles." (Cashman's Post-Trial Br. 233.) Cashman contends (1) written approval was not required where Mr. Otten provided verbal approval for the deviations from the plans; (2) if such written approval was mandatory, RIDOT waived this requirement; and (3) if written approval is required and not waived, that Mr. Otten, not Cashman, had the responsibility to submit such a request. *Id.* at 234.

Cardi, on the other hand, argues that Cashman was required to seek written approval for the deviations, and this requirement was not waived at any time. (Cardi's Post-Trial Br. 135.) Moreover, Cardi contends that any failure on the part of RTG, Cardi, or RIDOT to "catch" Cashman deviating from the plans does not equate to approval or acceptance. *Id.* at 139. Cardi also argues that Cashman was "solely responsible for ensuring that its work complied" with the plans, and that no party owed a duty to inspect Cashman's work. *Id.* at 135. Cardi also rebuts the three instances of oral approval purportedly offered by Cashman at trial. *Id.* at 135-36.

(a)

Written Approval

The contract documents define the effective method for consent for deviations from approved plans and specifications. Specifically, a reading of the Subcontract, Prime Contract, and incorporated contract documents, in addition to the credible testimony at trial, establishes that Cashman was required to seek written approval, at a minimum, for any deviation from the approved plans not considered "minor." *See* Trial Exs. 5273, 1501, 1303; *see also* Trial Tr. 103:17-21, Nov. 4, 2019; Trial Tr. 68:15-17, Nov. 1, 2019.

Cashman argues that it had no obligation to "secure formal written authorization from RIDOT prior to engaging in certain field modifications when those modifications were directed by the engineer of record." (Cashman's Post-Trial Br. 233.) Cashman contends that "[a] review of the General and Job Specific Specifications for this Project reveals that there is absolutely no contractual requirement that a field modification to engineering plans and/or shop drawings be subject to a formal written approval by RIDOT." *Id.* at 235. This argument, however, runs contrary to the plain language of the Prime Contract, Subcontract, and incorporated contract documents.

It is axiomatic that "[a] reviewing court has no need to construe contractual provisions unless those terms are ambiguous." *A.F. Lusi Construction, Inc. v. Peerless Insurance Co.*, 847 A.2d 254, 258 (R.I. 2004). Rather, the Court applies clear and unambiguous terms as written, "view[ing] the agreements in their entirety and giv[ing] the contractual language its 'plain, ordinary and usual meaning.'" *Id.* (quoting *W.P. Associates v. Forcier, Inc.*, 637 A.2d 353, 356 (R.I. 1994)).

The clear and unambiguous language of the Prime Contract indicates that Cardi agreed to

> "furnish all equipment, machinery, tools and labor; to furnish and deliver all materials required to be furnished and delivered in and about the improvement and to do and perform all work . . . in strict conformity with the provisions of this contract agreement, the notice to contractors, the proposal, the specifications and the plans approved by the Engineer, as defined in the specifications." (Trial Ex. 5273, at 1.)

Therefore, pursuant to the language of the Prime Contract, Cardi is obligated to perform "in strict conformity" with the provisions of the Blue Book, which provide the general specifications for the Project. *See id.* According to Section 105.03 of the Blue Book, "[w]ork performed and materials furnished shall be in reasonably close conformity with the lines, grades, cross sections, dimensions and material requirements, including tolerances, specified in the Contract Documents."[27] (Trial Ex. 1501, at 1-31.) Furthermore, Section 108.06 requires a contractor seeking to "use a method or type of equipment other than those specified in the Contract" to "request approval from the

[27] "Reasonably close conformity" is defined in the Blue Book as "compliance with reasonable and customary manufacturing and construction tolerances where working tolerances are not specified. Where working tolerances are specified, reasonably close conformity means compliance with such working tolerances. Without detracting from the complete and absolute discretion of the Engineer to insist upon such tolerances as establishing reasonably close conformity, the Engineer may accept variations beyond such tolerances as reasonably close conformity where such variations will not materially affect the value or utility of the work or the interests of the State." (Trial Ex. 1501, at 1-31.)

Engineer . . . in writing[.]" *Id.* at 1-63. The approval may be granted "on the condition that the Contractor will be responsible for producing construction work in conformity with Contract requirements." *Id.* Thus, according to the language of the Prime Contract, as well as the incorporated specifications, Cardi had an obligation to RIDOT to seek written approval for construction that deviated from the approved plans.

Furthermore, the explicit language of the Subcontract places the same obligation on Cashman in favor of Cardi. *See* Trial Ex. 1303, at 1. "[A] reference in a subcontract to the main or primary contract or to any other extraneous writing, made for a particular purpose, makes it part of the subcontract only for the purpose specified." *A.F. Lusi Construction, Inc.*, 847 A.2d at 261 (citing *Guerini Stone Co. v. P.J. Carlin Construction Co.*, 240 U.S. 264, 277 (1916)). Article I of the Subcontract clearly provides that Cashman agreed to "assume toward the Contractor all the obligations and responsibilities pertaining to such work that the Contractor, by those documents, assumes toward the Owner[.]" (Trial Ex. 1303, at 1.) Cashman also agreed that "all materials and workmanship incorporated into the work shall be in accordance with the provisions of the Prime Contract." *Id.* at 6. Therefore, pursuant to the terms of the Subcontract, Cashman retained the obligation to adhere to the plans and specifications prepared by RTG, approved by RIDOT, and furnished to Cashman by Cardi. *See* Trial Ex. 1303, at 1; Trial Ex. 5273, at 1; *see also Havens Steel Co.*, 613 F. Supp. at 528. Additionally, pursuant to the terms of the Blue Book and its assumption of obligations toward Cardi, Cashman was required to seek written authorization for modifications from the plans. *See* Trial Ex. 1501.

Cashman highlights testimony at trial in support of its position that authorization was not required for certain "field modifications," suggesting that the modifications at issue here would fall into that category. (Cashman's Post-Trial Br. 235.) It is true that some testimony at trial

demonstrated that for certain minor deviations, RIDOT would not need to give authorization. *See* Trial Tr. 66:18-21, Nov. 1, 2019. However, the record credibly established that there are only "rare circumstances" where a written submittal would not be required for a field modification. (Trial Tr. 66:18-21, 68:11-12, Nov. 1, 2019.) This circumstance would arise when a change is "insignificant" or "very minor" and does not relate to "structural stability or compromise[] any type of safety issue[.]" (Trial Tr. 68:11-17, Nov. 1, 2019.) *But see* Trial Tr. 80:23-81:13, Nov. 21, 2019 (Farhoumand testifying that *any* change would require written approval from the State unless it determined such approval was unnecessary). Yet, even assuming that the written authorization requirement did not apply for certain "minor" deviations, this fact does little to save Cashman in the instant matter. Ample credible evidence demonstrates that the deviations made by Cashman discussed herein—to the hanger brackets and cofferdam frame—could not be reasonably characterized as "minor" deviations of the kind which would not necessitate written authorization. *See* Trial Tr. 116:12-16, Feb. 4, 2020; *see also* Trial Exs. 620, 715. Indeed, it was established that the deviations at issue here contemplated changes to the very structure and integrity of the cofferdam. Structural deviations such as these, with the potential to affect the safety of the cofferdam, as Mr. Fish explicitly testified, would not be exceptions to the written authorization requirement. *See* Trial Tr. 68:15-17, Nov. 1, 2019; Trial Tr. 104:19-105:2, Nov. 4, 2019.

Next, Cashman contends that if the Court finds it had an obligation to seek written approvals for its deviations from the plans, this obligation was waived by the conduct of RIDOT's resident engineer, Mr. Studley. (Cashman's Post-Trial Br. 235-40.) Cashman highlights Mr. Studley's testimony at trial in which he described conversations with Mr. McNulty regarding the trimming of the hanger brackets, daily report records compiled by Mr. Studley's inspectors, and Mr. Studley's responsibility to request written submittals where he detected a deviation from

approved plans. *Id.* at 236-39. Cashman further argues that the contract documents do not contain an "anti-waiver" provision. *Id.* at 240.

Cardi, on the other hand, argues that the contract documents bar waiver of any contractual obligations by the resident engineer and, in addition, provide that one such waiver does not apply to all deviations. (Cardi's Post-Trial Br. 207-08.) Cardi further argues that Cashman cannot meet the high burden required to find a waiver of the authorization requirement because neither Cardi nor RTG held the power to waive this contractual requirement for modifications to the plans. *Id.* at 208-09. Last, Cardi argues neither RTG nor RIDOT were Cardi's agents and therefore could not act on Cardi's behalf to allow Cashman to deviate from the plans without seeking written approval. *Id.* at 209-10.

"'[W]aiver is the voluntary, intentional relinquishment of a known right[,] . . . result[ing] from action or nonaction . . . .'" *Sturbridge Home Builders, Inc. v. Downing Seaport, Inc.*, 890 A.2d 58, 65 (R.I. 2005) (quoting *Lajayi v. Fafiyebi*, 860 A.2d 680, 687 (R.I. 2004)). "'The party claiming that there has been a waiver of a contractual provision has the burden of proof on that issue.'" *Id.* (quoting *1800 Smith Street Associates, LP v. Gencarelli*, 888 A.2d 46, 55 n.4 (R.I. 2005)). Furthermore, "'[a] waiver may be proved indirectly by facts and circumstances from which intention to waive may be *clearly inferred*[.]'" *Id.* (quoting 28 Am. Jur. 2d *Estoppel and Waiver* § 225 (2000)) (second brackets and emphasis in original). Additionally, "'[a]n implied waiver may arise where a person against whom the waiver is asserted has pursued such a course of conduct as to sufficiently evidence an intention to waive a right or where his conduct is inconsistent with any other intention than to waive it.'" *Id.* (quoting *Kane v. American National Bank & Trust Co.*, 316 N.E.2d 177, 182 (Ill. App. 1974)). However, a finding of an implied waiver

requires proof of a "'clear, unequivocal, and decisive act of the party who is alleged to have committed waiver.'" *Id.* (quoting *Ryder v. Bank of Hickory Hills*, 585 N.E.2d 46, 49 (Ill. 1991)).

In support of its position on RIDOT's waiver, Cashman points to evidence at trial demonstrating that Mr. Studley and his employees were aware of the trimming of the hanger brackets and that it was part of Mr. Studley's responsibility to request a written submittal for deviations. (Cashman's Post Trial Br. 237-39.) Cashman further notes that Mr. Studley failed to request a written submittal for these observed deviations, even after RIDOT sent letters to Cardi which were forwarded to Cashman emphasizing that any changes to the cofferdam required a revised submittal. (Cashman's Post Trial Br. 238.)

The evidence regarding Mr. Studley's actions demonstrates, at most, a mere failure to fulfill his purported responsibility to request a written submittal for the trimming of hanger brackets.[28] It is true that trial evidence demonstrates that Mr. Studley and the RIDOT technicians saw the trimming of the hanger brackets. (Trial Tr. 66:16-67:4, Nov. 6, 2019.) Mr. Studley also discussed the trimming of the brackets with Mr. McNulty and asked him whether the engineer knew about the modification of the brackets. *Id.* at 69:12-21. Furthermore, it is not disputed that

[28] Also of note, Cardi argues that government contract caselaw supports its position that observation without objection by a person not authorized to accept the work does not excuse the contractor from the requirements under the contract. (Cardi's Post-Trial Br. 139.) In fact, several decisions rendered by the Armed Services Board of Contract Appeals reject the argument that a government inspector who fails to "protest" work not completed in accordance with plans accepts or authorizes such work. *See Appeal of Robert McMullan & Son, Inc.*, 68-1 BCA P 6940 (A.S.B.C.A.), ASBCA No. 11408, 1968 WL 4905 (Mar. 20, 1968) ("The Government has not obligated itself to supervise the work or to make a step by step inspection to avoid the installation of improper or unacceptable work. On the contrary, the contract places upon the contractor the burden of compliance with the contract specifications. A contractor is not relieved from this responsibility by the presence or absence of a Government inspector."); *Appeal of Atterton Painting & Construction, Inc.*, 88-1 BCA P 20478 (A.S.B.C.A.), ASBCA No. 31471, 1987 WL 46173 (Dec. 15, 1987) ("Appellant seeks, as others have done, to transfer its own shortcomings to the Government. That is not permissible.")

Mr. Studley did not request a formal submittal, despite his authority to request this submittal, or seek further information regarding modifications. *Id.* at 116:21-25, 125:21-126:16. However, these actions do not amount to a "clear" or "unequivocal" demonstration that RIDOT intended to waive the requirement for a written submittal. *See Sturbridge Home Builders*, 890 A.2d at 65.

In fact, although Cashman highlights a June 16, 2010 letter from RIDOT to Cardi sent prior to Mr. Studley's purported waiver, this letter tends to demonstrate that RIDOT did not intend to waive the written authorization requirement. *See* Trial Ex. 308. More specifically, in the June 16, 2010 letter, which was forwarded to Cashman, RIDOT emphasized that "any change from the approved shop drawing requires notification and a revised submittal." *Id.* at 3. Therefore, Cashman was on notice that any further changes would require a written submittal. *See id.*

Also, importantly, the Blue Book specifically precludes Mr. Studley, as resident engineer, from "authoriz[ing] . . . changes in any design element or project specification . . . ." (Trial Ex. 1501, at 1-35.) Cardi contends that "[b]ecause the requirement for written authorization is a requirement of the Specifications, this clause also prohibited Mr. Studley from waiving that requirement." (Cardi's Post-Trial Br. 208.) The Court agrees. Pursuant to Section 105.09 of the Blue Book, Mr. Studley could not approve design changes to the Project. *See* Trial Ex. 1501, at 1-35. Similarly, Mr. Studley was without authority to waive the requirement that the contractor seek written approval for such changes to the plans.[29]

[29] Cashman does not specifically argue that RTG or Cardi waived this requirement. *See* Cashman's Post-Trial Br. 236-39. Cardi contends that it could not waive this requirement without RIDOT first waiving it toward Cardi. (Cardi's Post-Trial Br. 208-09.) Additionally, Cardi argues that RTG and Mr. Otten had no authority to waive this provision. *Id.* The Court finds no evidence that, even if Cardi and RTG had the authority to waive such a provision, there was intent to waive it toward Cashman.

Last, Cashman seeks to shift responsibility for seeking written approval for changes to Mr. Otten and RTG. (Cashman's Post-Trial Br. 240.) Specifically, Cashman argues that Mr. Otten, as Cardi's engineer of record on the Project, had an obligation to "determine if plans/calculations are required for a field modification; draft said plans and perform said calculations and cause them to be submitted to RIDOT, by and through their client, Cardi, a path of communication dictated by Cardi." (Cashman's Post-Trial Br. 244.) Cashman cites testimony from Mr. Fish and Mr. Farhoumand to support its argument that "Cashman had no involvement or responsibilities relative to [the written submittal] process." *Id.* at 242. Cardi argues that there "is absolutely no basis" for Cashman's argument that RTG was required to report field deviations to Cardi. (Cardi's Post-Trial Br. 162.)

As described *supra*, Mr. Fish and Mr. Farhoumand credibly testified about the written submittal process. *See* Trial Tr. 67:3-25, 68:15-17, Nov. 1, 2019; Trial Tr. 104:19-105:2, Nov. 4, 2019; Trial Tr. 80:23-81:13, Nov. 21, 2019. Mr. Fish testified that "[t]ypically . . . if the resident engineer observed or one of the inspectors notified him that he observed a deviation from . . . either the specifications or the plans . . . they would notify the general contractor that . . . in order to proceed that a submission would be required." (Trial Tr. 67:20-68:1, Nov. 1, 2019.) Mr. Fish also testified that it would be the engineer's responsibility to draft the revised design or computations. (Trial Tr. 13:19-14:11, Nov. 4, 2019.) Mr. Farhoumand also testified that the engineer of record would provide a stamped plan for a submittal, and further, that it was typically "the responsibility of the resident engineer to make sure [a submittal] happens." (Trial Tr. 30:1-9, Nov. 21, 2019.)

Cashman's attempts to use this evidence to distance itself from an obligation to seek written approval for the deviations fails for several reasons. First, a clear chain of communication was established with respect to the marine cofferdams on this Project. (Trial Tr. 2:8-12, Dec. 4, 2019.)

The evidence demonstrates that Cashman was an integral part of this chain of communication. *See* Trial Exs. 1311, 314, 1710. In both the initial submittal process and throughout the course of the Project, the relevant inquiries, documents, or plans would travel from RIDOT to Cardi, to Cashman, to RTG, or the reverse order. *See id.* For example, during the initial submittal and revision process, although the plans drawn by RTG clearly indicate that they were prepared for Cardi, the records demonstrate that Cashman transmitted these plans to Cardi, and further, that RTG's responses to any questions proposed about the submittals were addressed to Mr. McNulty and Cashman. *See* Trial Exs. 1308, 1309, 1310, 1311. Indeed, this practice occurred when deviations were found during the Project. *See* Trial Exs. 271, 314. After RIDOT notified Cardi of the deviation in writing, Cardi forwarded the letter to Cashman, who sought responses from RTG. *See* Trial Ex. 314. RTG directed its responses to Cashman, who forwarded the comments to Cardi for submission to RIDOT. *See id.*; *see also* Trial Ex. 1710. Therefore, Cashman's actions with respect to other issues raised by RIDOT belies its argument that it had no involvement in the process.

Second, while it is true that Mr. Otten or RTG would have had the responsibility to *prepare* a revised drawing or calculations for a submittal, as they were the engineers on the Project, this does not discharge Cashman of its obligation under the contract to seek written approval. *See* Trial Exs. 1501, 1303. Moreover, with respect to the hanger brackets, it is clear that Mr. Otten was not aware of the scope of the deviation, and therefore could not have independently and accurately prepared a submittal. *See* Trial Tr. 114:22-116:16, Feb. 4, 2020. Furthermore, RTG had no duty to inspect Cashman's work for compliance with its design drawings. *See* Trial Tr. 104:23-105:4, Jan. 22, 2020; Trial Ex. 280, at 2 (RTG responding to RIDOT's request that it certify the installation of the cofferdam by asserting that "RTG has not been retained by the Contractor to

observe, inspect, or document that the Marine Cofferdams are being installed in accordance with the approved Shop Drawings"). Rather, Mr. McNulty had a duty to inspect and ensure that Cashman's work complied with the contract documents. (Trial Tr. 57:24-58:3, Dec. 3, 2019.)

Therefore, Cashman was required to seek written approval for its deviations from the plans. The evidence demonstrates that Cashman did not seek such authorization with respect to the removal of the outer ring of the hanger brackets. Additionally, Cashman did not seek written authorization with respect to the deviations from the plans for the cofferdam frames.

(b)

Oral Authorization

Cashman defends against Cardi's contract claim by pointing to Mr. Otten's purported authorization of certain of Cashman's deviations. (Cashman's Post-Trial Br. 233.) Cashman argues that Mr. Otten authorized Cashman to "make field modifications in order that the steel support frame could be assembled and the hanger brackets could be placed over the piles." *Id.* Cashman further argues that these "modifications were necessitated by Otten's failure to account for Project tolerances contained within the Project Specifications in his engineering plans[.]" *Id.*[30]

[30] Part of Cashman's argument appears to suggest that the reason for needing to deviate from the plans was the existence of constructability issues related to Mr. Otten's design; specifically, "Otten's failure to account for Project tolerances contained within the Project Specifications in his engineering plans[.]" *See* Cashman's Post-Trial Br. 233. Cardi argues that "any constructability issue that may have been encountered by Cashman should have been addressed in a written RFI[.]" (Cardi's Post-Trial Br. 226.) The Court agrees. If a constructability issue required a deviation from the original plan, Cashman was required to seek approval for that deviation. *See* Trial Tr. 122:10-19, Nov. 4, 2019 (Fish testifying that, in the event a contractor encountered a constructability issue, they would need to "submit a request for information on an RFI or they would modify a . . . shop drawing that had been . . . approved previously with . . . the proposed change to that shop drawing to accommodate the change in field conditions"). Thus, whether the plans contained constructability issues with respect to the hanger brackets or other features of the cofferdam is not dispositive of whether Cashman breached the Subcontract by deviating without approval or authorization. Moreover, Mr. McNulty reviewed the plans for constructability prior to their submission to RIDOT for approval. (Trial Tr. 95:11-15, Dec. 3, 2019.)

Cardi argues that Mr. Otten did not authorize the complete removal of the hanger brackets' outer rings or the frame deviations, including the single versus double nuts on the main carrier beams and removal of gussets. (Cardi's Post-Trial Br. 163, 184.)

First, the credible trial evidence establishes that Mr. Otten did not authorize modifications to the extent of those made to the hanger brackets. The evidence produced at trial on this point is clear. While Mr. McNulty and Mr. Otten discussed trimming the outer ring of the brackets to allow them to fit over the pile, Mr. Otten's purported authorization was limited and certainly did not extend to the complete removal of the outer ring. *See* Trial Tr. 114:22-116:16, Feb. 4, 2020. In fact, Mr. Otten specifically testified that he told Mr. McNulty to limit the trimming on the outer ring to the stiffeners, because a minimal trimming of the outside of the ring to the stiffeners would have "very little impact on the integrity . . . of the bracket." *Id.* at 117:1-3. The center of the ring and the stiffeners helped to "brace the whole bracket." *Id.* at 115:5-9. Yet, the evidence demonstrates that the outer ring was completely removed on some, or all, of the brackets. *See* Trial Ex. 1473. Indeed, it is unclear how many of the hanger brackets included this aggressive modification, as Cashman did not maintain records of this deviation for each bracket. Consequently, it is clear that Mr. Otten did not authorize the removal of the outer ring of the hanger brackets. Likewise, the credible evidence demonstrates that Mr. Otten did not approve Cashman's elongation of the rod holes in the hanger brackets.[31] (Trial Tr. 4:7-13, Feb. 4, 2020.)

[31] There is some evidence, however, that Mr. Otten approved an incorrect shop drawing for fabrication with six stiffeners as opposed to the eight demonstrated on the approved plans. *See* Trial Exs. 1311, 1312. To the extent that this approval is effective, as discussed herein, the Court finds that the repairs were required by Cashman's unauthorized deviations to the hanger brackets and cofferdam frames. Mr. Otten testified that the original bracket was designed with six stiffeners, but that two more were added for redundancy. (Trial Tr. 117:12-16, Feb. 4, 2020.)

Furthermore, the Court finds that Mr. Otten did not authorize the deviations to the cofferdam frame. *See* Trial Tr. 2:5-4:19, Feb. 4, 2020. Specifically, the credible evidence demonstrates that Mr. Otten did not orally approve the removal of the gussets or the installation of the rods without double nuts. *Id.* at 2:5-3:17.[32]

Even if Mr. Otten had given directions to modify the cofferdam, he did not possess the authority to unilaterally approve deviations from the plans or specifications on behalf of Cardi, and Cashman understood that Mr. Otten did not have this authority. While there is little doubt that RTG served as Cardi's subcontractor or independent contractor on the Project as its engineer, in order to effectively authorize changes on behalf of Cardi, Mr. Otten or RTG would have needed to be Cardi's agent with authority to accept the changes. *See 731 Airport Associates v. H & M Realty Associates, LLC*, 799 A.2d 279, 283 (R.I. 2002).

It is fundamental that "'an agency relationship exists when: (1) the principal manifests that the agent will act for him, (2) the agent accepts the undertaking, and (3) the parties agree that the principal will be in control of the undertaking.'" *Pineda v. Chase Bank USA, N.A.*, 186 A.3d 1054, 1057 (R.I. 2018) (quoting *Credit Union Central Falls v. Groff*, 966 A.2d 1262, 1268 (R.I. 2009)). Furthermore, in this type of relationship, an agent has "apparent authority" to bind the principal where there is an "'indicia of authority given by the principal to the agent,'" but does not necessarily require a "direct communication" from the principal. *731 Airport Associates*, 799 A.2d at 283 (quoting *Menard & Co. Masonry Building Contractors v. Marshall Building Systems, Inc.*,

[32] Although Cashman does not appear to address any purported authorization from Cardi with respect to the tremie concrete, Cardi argues in its Post-Trial briefing that the tremie concrete was poured to a thickness less than twenty-four inches and that there is no evidence that Cardi instructed Cashman to pour the slab thinner. (Cardi's Post-Trial Br. 197.) The Court agrees. Cardi did not instruct Cashman to pour the tremie concrete thinner than required by the plans. (Trial Tr. 53:3-18, Feb. 12, 2020.)

539 A.2d 523, 526 (R.I. 1988)). Furthermore, "the third party with whom the agent is dealing must 'believe that the agent has the authority to bind its principal to the contract.'" *Id.* (quoting *Menard & Co. Masonry Building Contractors*, 539 A.2d at 526).

As Cardi's engineer-of-record on the Project, Mr. Otten and RTG would necessarily be asked to make decisions or calculations about any aspect of the Project that required analysis, but there is no evidence of an "'indicia of authority'" given by Cardi to RTG or Mr. Otten to unilaterally approve deviations to the plans verbally. *See 731 Airport Associates*, 799 A.2d at 283 (quoting *Menard & Co. Masonry Building Contractors*, 539 A.2d at 526). The evidence at trial demonstrated that RTG held no duty to inspect Cashman's work on behalf of Cardi. *See* Trial Tr. 104:23-105:4, Jan. 22, 2020. Furthermore, as noted, it was Cashman's practice throughout the Project to request responses from RTG when facing an inquiry by RIDOT, and those responses would then be forwarded to Cardi.

The ultimate authority for allowing changes to the approved plans rested with the engineers at RIDOT. *See* Trial Ex. 1501, at § 108.06; Trial Tr: 66:17-21, Nov. 1, 2019. Mr. McNulty clearly understood that Cashman could not perform work that deviated from the approved plans without approval by RIDOT. (Trial Tr. 33:3-7, Dec. 4, 2019.) In addition, the contract documents make clear that Mr. Studley lacked authority to approve a deviation from the plans or specifications. (Trial Ex. 1501, at § 105.09.) Therefore, any purported verbal authorization made by Mr. Studley would be ineffective to discharge Cashman of its obligation with respect to the deviations from the plan, and there is no evidence that any authorized person from RIDOT approved of Cashman's deviations. The trial record is void of testimony indicating that Mr. Farhoumand, as engineer, or any other authorized person at RIDOT approved the deviation to the hanger brackets. *See* Trial Tr. 47:11-14, Nov. 21, 2019.

The contract requires written requests for approval of non-minor deviations, yet even if verbal directions served as effective and valid approvals for deviations, Cashman was not given any such authorization permitting the deviations to the hanger brackets, the cofferdam frame found in the dive reports, or tremie concrete slab thickness.

ii

Material Breach

Cashman argues that in the event that the Court determines that it failed to comply with the plans, such deviations were "not material because the original approved design . . . was not in compliance with the Project Specifications, including job specific specifications and applicable engineering codes[.]" (Cashman's Post-Trial Br. 249.) However, Cashman has failed to demonstrate how such alleged design deficiencies affect the materiality of Cashman's actions in deviating from the approved plans. "A material breach occurs when there is a breach of an essential feature of a contract, and must defeat the parties' object in making it." *Parking Company, L.P. v. Rhode Island Airport Corporation*, No. Civ.A. P.B. 2004-4189, 2005 WL 419827, at *4 (R.I. Super. Feb. 18, 2005). The evidence produced at trial demonstrates that Cashman materially breached the contract by constructing marine cofferdams that deviated from the plans furnished to it by Cardi and approved by RIDOT. *See* Trial Exs. 620, 715. The deviations at issue here affected the structural integrity of the cofferdams and repairs were required to render the structures safe. *See* Trial Exs. 620, 715, 2330. These deviations were not minor or inconsequential to Cashman's performance under the contract. The Court finds that, without approval or consent for the deviations, as discussed above, Cashman has materially breached the Subcontract.

Furthermore, Cardi argues that Cashman materially breached the Subcontract by failing to remove the cofferdam frames. (Cardi's Post-Trial Br. 425, 456.) On August 22, 2011, Cardi sent

a letter to Cashman noting when the cofferdam at each pier would be ready for removal, also stating that Cashman should "ensure that all three of the marine cofferdams are removed no later than February 1, 2012 in order to avoid causing further delays to the project[.]" (Trial Ex. 2249, at 1.) After receiving correspondence from Cashman indicating that it would not perform the removal work unless it was paid the outstanding balance on the Subcontract, Cardi sent a follow-up letter on December 23, 2011. *See* Trial Ex. 2270. Cardi stated that Cashman was responsible for any additional removal costs associated with the removal process and that amounts under the Subcontract were being withheld to cover a portion of the damages Cardi incurred during repair work. *Id.* Cardi further asserted that it would "construe [Cashman's] demand for payment before performing the cofferdam removal work as a wrongful refusal to perform that work, and a further default under the subcontract." *Id.* at 1. Ultimately, Cardi removed the cofferdam frames. (Trial Tr. 46:22-47:22, Nov. 8, 2019.)

Pursuant to the Subcontract, it was within Cashman's scope of work to remove the floating form systems at Piers 4, 5, and 6 upon placement of the concrete. *See* Trial Ex. 1303, at 23. In its August 22, 2011 letter to Cashman, Cardi clearly demanded performance under the terms of the Subcontract. *See* Trial Ex. 2249. Cashman, however, refused to perform. Furthermore, although Cashman did not dispute Cardi's conclusion in its January 18, 2011 letter that "Cashman is unfit to be permitted to perform further construction work on this Project[,]" or Cardi's statement that "[a]ll necessary repairs or modifications to the marine cofferdams will . . . be performed by Cardi and its subcontractors[,]" the August 22, 2011 letter makes clear that Cardi has not fully rejected Cashman's performance of all work remaining under the Subcontract. *See* Trial Ex. 2036, at 2; Trial Ex. 2249. As the Court has stated, Cashman is only relieved of its obligations under the contract where a material breach by the other party occurs. *See Women's Development Corp.*, 764

A.2d at 158. Consequently, the Court must now turn to Cashman's assertion that Cardi committed the first material breach by supplying Cashman with defective plans. (Cashman's Post-Trial Br. 177.)

b

Implied Warranty of Plans

In Count III, Cashman alleges that Cardi breached the Subcontract by furnishing to Cashman defective plans, which caused Cashman to "incur[] substantial damages by way of increased costs" due to "multiple modifications to the hanger brackets and extra work." (Cashman's Fifth Am. Compl. ¶¶ 227-229; Cashman's Post-Trial Br. 227.) Cashman contends that Cardi failed to provide defect-free plans to Cashman, instead supplying design documents with overstressed cofferdam elements in violation of applicable design codes. (Cashman's Post-Trial Br. 228-29.) Cardi asserts that Cashman cannot prevail on this claim for a number of reasons: (1) Cashman is barred from recovery under the Subcontract because it committed a material breach; (2) Cashman abandoned the Subcontract and therefore cannot recover; (3) the evidence established that the plans were not defective based on the only credible expert testimony at trial; and (4) the allegations sound in negligence, and Cashman has not sustained its burden of proof to establish the standard of care that Cardi and RTG owed to Cashman in furnishing the plans. (Cardi's Post-Trial Br. 493-99.)

Courts have recognized an implied warranty that flows from an owner to a contractor in a construction project when the owner furnishes plans to the contractor. *See Penzel Construction Company, Inc. v. Jackson R-2 School District,* 544 S.W.3d 214, 226 (Mo. Ct. App. 2017). This implied warranty is rooted in the *Spearin* doctrine, which "'stands for the proposition that when a governmental entity includes detailed specifications in a contract, it impliedly warrants that (1) if

the contractor follows those specifications, the resultant product will not be defective or unsafe, and (2) if the resultant product proves defective or unsafe, the contractor will not be liable for the consequences.'"[33] *See id.* (quoting *Caddell Construction Company v. United States*, 78 Fed. Cl. 406, 410 (2007)); *see also United States v. Spearin*, 248 U.S. 132, 136 (1918) ("[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications."); *Alpert v. Commonwealth*, 258 N.E.2d 755, 763 (Mass. 1970) ("It is well established that where one party furnishes plans and specifications for a contractor to follow in a construction job, and the contractor in good faith relies thereon, the party furnishing such plans impliedly warrants their sufficiency for the purpose intended.").

This principle outlined in *United States v. Spearin*, cited *supra*, is most often used as a defense to a contract action. However, it is also a basis for recovery under the contract. *See Penzel Construction Company, Inc.*, 544 S.W.3d at 226*; see also Coghlin Electrical Contractors, Inc. v. Gilbane Building Co.*, 36 N.E.3d 505, 511 (Mass. 2015) (quoting P.L. Bruner & P.J. O'Connor, Jr., *On Construction Law* § 9:82, at 670 (2002)) ("This implied warranty between the owner and the contractor 'is a representation that the design is defect-free,' and the contractor 'need only show that the defect exists and that he suffered damages as a result thereof' in order to recover.") Although the owner warrants that "'the design plans are 'reasonably accurate'. . . the specifications need not be perfect.'" *Penzel Construction Company, Inc.*, 544 S.W.3d at 226 (quoting *Caddell*, 78 Fed. Cl. at 413). Rather, to recover on the claim, the plans and specifications must be "defective

[33] At least one court has noted an exception to this doctrine "where the contractor had unique knowledge that the plans were obviously flawed and did not inform the owner." *Central Ohio Joint Vocational School District Board of Education v. Peterson Construction Co.*, 716 N.E.2d 1210, 1216 (Ohio Ct. App. 1998).

or 'substantially deficient,'" which means that the plans are "'so faulty as to prevent or unreasonably delay completion of the contract performance.'" *Id.* at 227 (quoting *Caddell*, 78 Fed. Cl. at 413); *see also Caddell*, 78 Fed. Cl. at 413 ("[T]he government's documents must be 'substantially deficient or unworkable' in order to be considered a breach of the contract.") (internal quotation omitted).

In order to successfully assert an implied warranty claim of this type, the contractor must have followed the plans furnished by the owner. *See Penzel Construction Company, Inc.*, 544 S.W.3d at 226 (quoting *Caddell*, 78 Fed. Cl. at 410) (stating, as part of the description of the claim, that an owner is liable "if the contractor follows those specifications"); *see also Alpert*, 258 N.E.2d at 763 (holding that the implied warranty applies when "the contractor in good faith relies" upon the plans). Indeed, several courts have held that the *Spearin* doctrine and implied warranty are unavailable to contractors who fail to follow the plans, unless the deviation is unrelated to the defect in the plans or there is "manifest inequity." *See Al Johnson Construction Co. v. United States*, 854 F.2d 467, 470 (Fed. Cir. 1988) (stating that because "strong policy" supports "the restriction of the implied warranty to those who have fulfilled the specifications, or tried and failed to do so because of the defects themselves," rather than "allowing the implied warranty to run to one who has not done what he contracted to do and fails to satisfactorily explain why not[,]" exceptions should "be restricted to instances, not now foreseen, of manifest inequity, or to a deviation from the specifications shown to have been entirely irrelevant to the alleged defect"); *Jonovich Companies, Inc. v. City of Coolidge*, No. 2 CA-CV 2011-0029, 2011 WL 5137180, at *3 (Ariz. Ct. App. Oct. 31, 2011) (citing federal caselaw with approval as holding "if the contractor failed to comply fully with the faulty design specifications, recovery on the implied warranty is precluded"); *Travelers Casualty & Surety of America v. United States*, 74 Fed. Cl. 75, 89-90 (2006)

("[A] contractor must fully comply with and follow the design specifications, although faulty, to enjoy the protections of the implied warranty, unless the departure from the specifications is entirely irrelevant to the alleged defect.") (internal quotation omitted); *see also Coghlin*, 36 N.E.3d at 516 ("[W]here the contractor does not rely in good faith on the designer's plans and specifications, the contractor is responsible for the increased costs arising from design defects.").

Here, the clear and unambiguous trial record demonstrates that Cashman failed to follow the plans furnished to it by Cardi. Furthermore, neither of the minor exceptions to the preclusion of the doctrine apply here. *See Al Johnson Construction Co.*, 854 F.2d at 470. The deviations from the plans directly relate to the allegations of deficient design and engineering and there is no basis to conclude that it would be a "manifest inequity" to bar Cashman from asserting this doctrine. *See id.* Consequently, Cashman is not permitted to recover based on a breach of the implied warranty of plans from Cardi.[34] Furthermore, because Cardi did not materially breach the Subcontract, Cashman was not relieved of its obligation under the contract to complete the cofferdam removal. Therefore, absent a discharge of its obligations under the Subcontract, Cashman's refusal to perform the removal of the cofferdams constitutes a material breach. Cardi is entitled to judgment on Count III of Cashman's Fifth Amended Complaint and on Count I of its Counterclaim.

[34] Cardi argues that Cashman's expert was required to establish a standard of care in order to prove that the plans were defective, and that failure to do so is fatal to the claim regarding defective plans. During trial, Cardi moved under Rule 52(c) for a judgment as a matter of law on Counts III and XVIII based on Cashman's failure to elicit a standard of care for the purported defective design. (Trial Tr. 65:4-5, 66:2-67:5, Feb. 13, 2020.) The Court denies this motion as to Count III. As this Court has determined that such a claim is not available to Cashman on the basis that it deviated from the plans, it need not determine here whether the plans were deficient within the meaning of *Spearin*. However, the Court also notes that "[t]he implied warranty in a *Spearin* claim is that the plans are free from significant defects; it is not simply a guarantee that a particular level of care and competency was used to create the plans." *Penzel Construction Company, Inc.*, 544 S.W.3d at 228.

c

Causation

Cardi contends that Cashman's breach was "the direct cause of the work stoppage in the Cofferdams, which in turn led to the dive inspections and the resultant remedial engineering and construction and delays." (Cardi's Post-Trial Br. 443.) Cardi argues that it incurred damages in the form of repair costs to remediate the hanger brackets and the cofferdam frame, which were included in approved repair plans involving concrete beams and a "2-Pour" concrete placement. *Id.* at 443-56. Cardi also argues that it incurred damages when Cashman unjustifiably refused to remove the cofferdams, as was required under the Subcontract. *Id.* at 456. According to Cardi, all of these damages resulted from Cashman's breach of the Subcontract. *Id.* at 443.

Cashman argues that Cardi cannot recover on its claim because RTG's defective design is "the cause-in-fact and sole proximate cause of the need for repairs on the Marine Cofferdams." (Cashman's Post-Trial Br. 260.) Cashman further asserts that it cannot be liable for any deviation because "Cashman's construction, even if negligent, cannot constitute an intervening cause or a proximate cause with respect to those damages." *Id.* Cashman asserts that Cardi provided it with defective plans, and that the cofferdams "were at risk of a full or partial collapse when the pier cap concrete was placed in the cofferdams even if they had been built to the exact letter of [RTG's] RIDOT-approved design." *Id.* at 262. Therefore, Cashman contends, "Cardi cannot say that but for the actions of Cashman, there would have been no need for repairs to the Marine Cofferdams and there would not have been any cofferdam-related Project delays because of those repairs." *Id.*

Rhode Island law is clear that a party bringing an action for breach of contract must prove "that the defendant's breach thereof caused the plaintiff's damages." *Fogarty*, 163 A.3d at 541.

Indeed, where there are multiple potential causes of injury, the breach must have been "a substantial or primary cause." *Wells*, 635 A.2d at 1191.[35]

Both the substantive question as to whether the plans were defective, as well as the standard by which to judge those plans, are contested by the parties. In short, Cashman argues that the contract documents dictate the standard for the plans—that they comply with applicable design codes—and any plans failing to follow those codes are rendered defective and require repair. *See* Cashman's Post-Trial Br. 34. According to Cashman, Cardi would have been responsible for implementing the same repairs even had Cashman not deviated from the plans in order to bring the cofferdams into code compliance. *Id.* at 34-35. Cardi views a defective design, as related to causation, in terms of failure or collapse of the cofferdam. (Cardi's Post-Trial Br. 387.) Cardi

[35] Cardi argues that this Court should apply the "Illinois" rule, which, it argues, "renders Cashman liable for all of the damages at issue" upon a prima facie showing by Cardi that Cashman deviated from the approved plans. (Cardi's Post-Trial Br. 483.) Alternatively, Cardi asks that this Court apply the "North Carolina" rule, which shifts the burden of proof to Cashman to demonstrate that Cardi's damages were caused by the defective design. *Id.* at 483. The Court in *Havens Steel Co.*, cited *supra*, succinctly described these two approaches. *Havens Steel Co.*, 613 F. Supp. at 528. In particular, the *Havens* Court described that the "Illinois" rule "renders a deviating contractor liable for whatever may subsequently happen to the structure, without resort to any formal proof of causation if the deviation was 'material,' and in fact denies the contractor even the ability to offer an affirmative defense that the damage was caused by something other than his deviation[.]" *Id.* at 529 (citing *Clark v. Pope*, 70 Ill. 128, 132-33 (1873)). The "North Carolina" rule, as described in *Havens*, "in effect treats proof of a deviation as creating a prima facie case on that point, and allows the contractor to rebut by proving that the damage was not in fact caused by the deviation[.]" *Id.* (citing *Burke City Public Schools v. Juno Construction*, 273 S.E.2d 504, 507-08 (N.C. 1981)).

In ruling on pretrial motions, the Court declined to apply either rule because, at that time, the issue of consent had yet to be determined. (Trial Tr. 23:9-20, Oct. 22, 2019.) While the issue of consent is no longer a barrier to application of these rules, the Court remains unconvinced that either of these approaches are appropriate here. First, no Rhode Island Supreme Court case has addressed whether either of these rules applies in this jurisdiction. To apply the "Illinois" rule in this case would effectively discharge Cardi of its obligation to prove causation, which runs contrary to established Rhode Island law. *See Fogarty*, 163 A.3d at 541. Furthermore, the Court will not apply the burden-shifting rule set forth in the "North Carolina" approach, because contract principles in Rhode Island dictate that a claimant must prove the causal connection. *See id.*

relies on expert testimony stating that the as-designed plan would not have caused a failure of the cofferdam, and therefore asserts that Cashman's deviations must be the cause of its damages from the remediation of the cofferdams. *Id.*

Cashman's argument as to defective plans relies on evidence and opinion related to an analysis performed by Mr. Konicki. Cashman asks this Court to accept Mr. Konicki's testimony as credible. Consequently, the Court now pauses to discuss Mr. Konicki's credibility. Mr. Konicki was initially retained during the peer review process, which lasted from October 2010 through March 2011. (Trial Tr. 83:18-84:2, Feb. 10, 2020.) He later performed a bounded analysis and testified on behalf of Cashman. *Id.* at 10:18-23. Throughout the peer review process, Mr. Konicki sent his letters regarding the Project to Mr. McNulty for his review and recommendation before the letters were officially issued. *Id.* at 84:5-12. In at least one instance, Mr. Konicki felt it necessary to remind Mr. McNulty that "[w]e need to keep this as unbiased as we can[.]" *Id.* at 85:15-19; Trial Ex. 2012. Indeed, on further cross-examination, Mr. Konicki conceded that Cashman may have had some influence in the peer review process, often suggesting changes to certain language in SGH's reports or letters. (Trial Tr. 90:18-92:19, Feb. 10, 2020.) Although the requested changes to Mr. Konicki's reports were not "completely" implemented in most circumstances, it is clear to this Court that Mr. Konicki was aligned with Cashman and his testimony relating to the independence of his analysis is of little weight. *Id.* at 92:10-12.

During the peer review process, Mr. Konicki informed Mr. McNulty that the as-designed hanger brackets were significantly overstressed. *See* Trial Ex. 5267, at 3. Mr. Konicki's first peer review report, analyzing the hanger brackets, concluded that the as-built and as-designed hanger brackets both exceeded yield stress levels. (Trial Ex. 428, at 2-3, 4-5.) Mr. Konicki's second peer review report examined the as-designed marine cofferdam structure, at Mr. McNulty's request.

(Trial Tr. 102:2-104:7, Feb. 6, 2020.) In the December 15, 2010 peer review letter, SGH identified several issues with the design of the cofferdam structure and concluded that "[i]t is possible that a full or partial collapse of the marine cofferdam structure could occur during the placement if one or more of the major issues identified are not addressed prior to loading." (Trial Ex. 522, at 10.) Furthermore, SGH issued a letter following the dive inspections summarizing "a total of 21 different construction deficiencies" which were categorized by impact to the cofferdam structure. *See* Trial Ex. 715. In this letter, SGH also commented on some purported design issues relating to the construction deviations. *See, e.g., id.* at 4 (noting that category "P" deviation condition is "design related"). SGH reiterated its opinion at that time that design issues rendered the cofferdam at risk of full or partial collapse. *See id.* at 6.

Mr. Konicki's bounded analysis, however, produced a different conclusion, based on a different standard—compliance with applicable codes. *See* Trial Ex. 5467, at 9. Specifically, in his 2019 expert report, Mr. Konicki opined that the "bounded analysis shows that all the hanger brackets and all the beam bottom flange connections as designed by RTG, exhibit stresses exceeding the allowable stresses prescribed by the AISC Specification . . . and the AASHTO LRFD Bridge Design Manual for the piles[.]" *Id.* Mr. Konicki also opined, to a reasonable degree of engineering certainty, that if the pier cap was placed in a single-pour method as initially designed, "many components" of the cofferdam would be "overloaded and overstressed." (Trial Tr. 52:5-16, Feb. 7, 2020.) Mr. Konicki testified that repairs would still be required on "almost every component" of the as-designed cofferdam because most stress levels were above allowable levels under the code and some were above the yield points. (Trial Tr. 53:7-11, Feb. 10, 2020.) Mr. Konicki did not, however, reiterate his earlier conclusion that the cofferdam would fail as a result of design defects. *See* Trial Ex. 5467.

Contrary to Cashman's argument, this Court cannot conclude based on the credible evidence that the plans were so deficient as to necessitate or cause the repairs at issue here. First, in addition to the issue of Mr. Konicki's credibility, both the peer review calculations and the conclusion derived from them regarding the cofferdam structure failure suffer from certain calculation issues. *See* Cardi's Post-Trial Br. 299-309. For example, Mr. Konicki admitted that the load calculation in SGH's peer review was overstated. (Trial Tr. 118:13-17, Feb. 10, 2020.) This is further demonstrated by the fact that Mr. Konicki used a maximum bracket load of nearly 200 kips less in his bounded analysis, years after the peer review was completed. *Id.* at 110:11-111:19.

Moreover, even accepting the peer review results as valid, there is evidence in the record from Mr. Konicki that only some of the brackets may have needed repair due to the purported design defects, but that all of the brackets needed repair based on construction deviations.[36] *See* Trial Tr. 71:7-12, Feb. 11, 2020. Mr. Konicki agreed that while some brackets as-designed may have been overloaded, some may have been sufficient to withstand the stress levels, because the load does not spread evenly throughout the cofferdam. (Trial Tr. at 138:5-11, Feb. 10, 2020.) Furthermore, Mr. Konicki agreed that a "uniform repair" plan made sense regarding the cofferdam frame repairs due to the uncertainty about whether, "at any given location, it was due only to construction deviations, or a combination of design and construction deviations[.]" (Trial Tr. 84:19-23, Feb. 11, 2020.)

[36] Mr. Konicki also noted that, although this was the conclusion from his peer review, the bounded analysis later demonstrated that almost all of the brackets would have needed modification from the design. (Trial Tr. 71:12-15, Feb. 11, 2020.) However, as noted *supra*, in the bounded analysis, Mr. Konicki's conclusion regarding components requiring repair related to code compliance. *See* Trial Ex. 5467.

Additionally, Mr. Konicki's bounded analysis does not lead to the conclusion that any deficiencies in the plans caused Cardi's repair damages. The Court heard ample expert testimony concerning the applicable codes, stress conditions, and temporary structure allowances. *See, e.g.*, Trial Tr. 16:2-23:10, Feb. 6, 2020. While Cashman offers a strict standard for the determination of what constitutes a "defective" plan—any noncompliance with the applicable codes—other courts have defined the term as "so faulty as to prevent or unreasonably delay completion of the contract performance." *See Penzel Construction Company, Inc.*, 544 S.W.3d at 227 (internal quotation omitted). However, the critical inquiry here is whether Cashman's deviations were the "substantial or primary cause" of Cardi's damages, or, in other words, whether repairs would have been required as a result of some other cause—namely, the design/engineering deficiencies in the plans. *See Wells*, 635 A.2d at 1191. Thus, failure to comply with codes would only be relevant to causation here if it can be shown that the non-compliance necessitated or caused the remedial measures implemented on the cofferdams.

Notably, the approved plans and specifications were reviewed and vetted for compliance prior to approval by Commonwealth and were ultimately accepted by RIDOT. (Trial Tr. 12:13-19, Nov. 5, 2019.) There is also evidence in the record that code specifications may be waived in certain situations. (Trial Tr. 97:23-98:1, Nov. 4, 2019.) Indeed, while some code violations may well require repairs or actions to bring the Project into conformance with the contract documents, there is insufficient evidence demonstrating that a violation of a code automatically requires repair. *See* Trial Tr. 45:22-46:2, Nov. 21, 2019 (Farhoumand testifying that if the cofferdams were not in compliance with codes, the department could, "[i]f it is a minor thing . . . based on engineering judgment, . . . write it off" but for "major things, you require the contractor to submit some action plan to correct the deficiency"). Here, even assuming the plans contained code violations, whether

the plan's non-compliance required action by the contractor is pure speculation. Cardi introduced evidence demonstrating that measures other than the actions taken during the Project to remediate the cofferdams at issue could have cured certain overstressed conditions, to the extent they existed. *See* Trial Ex. 2330, at 1-2; Trial Ex. 5482, at 9; Trial Ex. 2617, at 10. Indeed, Mr. Tamaro opined that although "there was a small risk that localized high stresses could have caused minor deformations in some elements of the cofferdams," these deformations "would have had no impact on the stability or function of the cofferdams[.]" *See* Trial Ex. 2330, at 2. Furthermore, Mr. Tamaro also produced a report demonstrating that, even using the conclusions from the bounded analysis, only some beams would be in need of repair. *See* Trial Ex. 2366, at 6; Trial Ex. 3.

Moreover, as explained above, the evidence here is insufficient to show that the design of the cofferdams would have caused failure. *See Al Johnson Construction Co.*, 854 F.2d at 470 (finding that although "appellant attempted to show the board that the berm would have failed anyway, even if it had met the specification completely[,]" any statement about "[w]hat would have happened in the event of a contingency that did not occur is speculative at best"). In his expert report, Mr. Tamaro credibly opined that the "steel support beams, steel brackets and steel anchor rods, although not always within allowable stress limits, were . . . within tolerable levels for temporary structures such as the cofferdams, except for localized areas where calculated stresses may have caused limited deformation." (Trial Ex. 2330, at 12.) These localized deformations, according to Tamaro, "would not have caused the failure of these structures." *Id.* Mr. Tamaro also noted that, in temporary structures, "stresses which are higher than those allowed in permanent structures are sometimes tolerated." *Id.* at 11. The Court gives weight to Cardi's expert testimony that the as-designed cofferdams would not have failed. *See id.* at 2.

Conversely, the evidence unequivocally demonstrates that, as a factual matter, the work stoppage and initiation of repair plans occurred as a direct result of the discovery of the significant hanger bracket modifications and the inability to determine the extent of the deviation. (Trial Exs. 5261, 397, 385.) The discovery of the hanger bracket modifications, and the ensuing dive report that revealed further cofferdam frame deviations, culminated in the "2-pour" and "mini concrete" beam remedial design.[37] (Trial Exs. 750, 504.) Indeed, after the dive inspection, Mr. Konicki informed Mr. McNulty that "SGH is satisfied with the diving inspection results" and "believe[s] repair concepts can be developed *for the conditions currently observed*[.]" (Trial Ex. 1958 (emphasis added).) The observed conditions would have referred to the cofferdams, as-built by Cashman. *See id.*

Furthermore, there is sufficient credible evidence on this record to conclude that the deviations necessitated repairs from an engineering standpoint. It is clear that the hanger bracket deviations compromised the structural integrity of the cofferdams. (Trial Tr. 116:12-16, Feb. 4, 2020; Trial Tr. 138:12-20, Feb. 10, 2020 (finding during the peer review that removing the outer ring doubled the stress); Trial Ex. 2330, at 23 (finding that the as-built bracket would have failed "unless tremie bond supported the cofferdam load").) Likewise, following the dive inspections, it was clear that the cofferdam frame was also unsafe for use. *See* Trial Exs. 620, 715. Moreover, Mr. Tamaro opined that the deviations to the cofferdam frame contributed to the potential failure of the cofferdam before loads and stresses were placed on the structure. (Trial Ex. 2330, at 2, 3.) Significantly, both experts agreed that the as-built cofferdam needed repair in order to make the structure safe. *Id.* at 3; Trial Tr. 52:6-17, Feb. 11, 2020; Trial Tr. 143:5-7, Feb. 10, 2020 (Konicki

[37] Mr. Konicki agreed that the peer review letters purporting to raise a design issue made no mention of violation of codes at the time repairs were generated. (Trial Tr. 151:14-18, 153:6-15, 155:15-21, Feb. 10, 2020.)

testifying that if the brackets with the outer legs removed were located at the highest stress areas within the cofferdam, it would be possible for a catastrophic outcome to occur). Even if the repairs also addressed purported design issues, a review of the trial evidence makes clear that the remedial work occurred due to Cashman's material breach of the Subcontract in deviating from the plans.

Consequently, after review of the evidence, the Court finds that Cashman's unauthorized deviations, including those made to the hanger brackets and cofferdam frames as discovered in the dive report, were the primary or substantial cause of Cardi's damages associated with the repair of the cofferdams at Piers 4, 5, and 6.[38] Thus, Counts I and III of Cashman's Fifth Amended Complaint are denied and dismissed. Because, as Cashman noted, its claim against Cardi's surety, Safeco, is tied to a determination in its favor on liability, Count XXII is also dismissed. Additionally, Cardi is entitled to judgment on the issue of liability against Cashman with respect to Count I of its Counterclaim.

B

Cashman Count II: Unjust Enrichment

In Count II of its Fifth Amended Complaint, Cashman alleges that it has "substantially completed all its work" contemplated by the Subcontract, "less the removal of the floating form systems at Piers 4, 5 and 6." (Fifth Am. Compl. ¶ 201.) Cashman further alleges that Cardi has been paid by RIDOT for all of the work performed, but that Cashman has not been fully compensated for its work on the Project. *Id.* ¶¶ 203-204. Cashman also states that "Cardi has utilized the work performed by [Cashman] in order to perform further work to the cofferdams to correct the defective design of the marine cofferdams." *Id.* ¶ 207.

[38] It is also worth noting that there is clearly a causal connection between Cashman's refusal to remove the cofferdam forms, as was prescribed under the Subcontract, *see* Trial Ex. 1303, at 23, and Cardi's costs relating to that removal, *see* Trial Tr. 46:22-47:13, Nov. 8, 2019.

Cardi argues that Cashman may not recover under this theory of liability because unjust enrichment claims are only allowed where there is not a contract between the parties covering such subject matter. (Cardi's Post-Trial Br. 502.) In response, Cashman contends that it performed work other than the work it could not complete because of Cardi's wrongful termination and that it would be inequitable for Cardi to get the benefit of Cashman's work without compensating Cashman for that work. (Cashman's Post-Trial Br. 268-69.)

"Unjust enrichment is '[t]he retention of a benefit conferred by another, who offered no compensation, in circumstances where compensation is reasonably expected.'" *South County Post & Beam, Inc. v. McMahon*, 116 A.3d 204, 210 (R.I. 2015) (quoting Black's Law Dictionary 1771 (10th ed. 2014)). A claimant seeking to recover on a claim for unjust enrichment must prove: "'(1) that he or she conferred a benefit upon the party from whom relief is sought; (2) that the recipient appreciated the benefit; and (3) that the recipient accepted the benefit under such circumstances that it would be inequitable for [the recipient] to retain the benefit without paying the value thereof.'" *Id.* at 210-11 (quoting *Emond Plumbing & Heating, Inc. v. BankNewport*, 105 A.3d 85, 90 (R.I. 2014)). "'[A]ctions brought upon theories of unjust enrichment and quasi-contract are essentially the same.'" *Id.* at 211 (quoting *Multi-State Restoration, Inc. v. DWS Properties, LLC*, 61 A.3d 414, 418 (R.I. 2013)). "It is well established that 'recovery for unjust enrichment is predicated upon the equitable principle that one shall not be permitted to enrich himself at the expense of another by receiving property or benefits without making compensation for them.'" *Id.* at 213 (quoting *Emond Plumbing & Heating, Inc.*, 105 A.3d at 90).

Here, Cashman's claim for unjust enrichment is grounded in two separate factual bases. First, Cashman alleges it completed the work contemplated by the Subcontract, aside from the removal of the floating form systems, and was not compensated for such work. *See* Fifth Am.

Compl. ¶¶ 201-04. Second, Cashman performed work regarding the investigation of the design of the cofferdam, which conferred a benefit on Cardi, and Cashman has not been compensated for that work. *Id.* ¶¶ 205-07. The equitable claim relating to the second of these factual bases will be addressed in the Court's discussion of Cashman's claim for breach of contract/quantum meruit for extra work under Count XIV.

As to the part of the claim for unjust enrichment that is based on unpaid work contemplated by the Subcontract, the Court finds that this claim fails. While "[i]t is entirely appropriate for a party to plead and proceed to trial on the alternate theories of breach of contract and unjust enrichment[,] . . . where the relief a party seeks is governed by the terms of an express contract, relief under the doctrine of unjust enrichment is inappropriate." *Lakeside Electric, Inc. v. ULBE, LLC*, No. WM20130635, 2014 WL 4412650, at *6 (R.I. Super. Aug. 28, 2014); *see also Mehan v. Gershkoff*, 102 R.I. 404, 409, 230 A.2d 867, 870 (1967) ("It is well settled that where there is an express contract between the parties referring to a subject matter, there can be no implied contract arising by implication of law governing that same subject matter."). Cashman is seeking relief for work completed within the scope of the Subcontract, which the Court has addressed. Consequently, Cashman's claim for unjust enrichment is denied and dismissed.

C

Cashman Count XIV: Breach of Contract/Quantum Meruit for Extra Work

In Count XIV, Cashman brings claims for recovery based on work it allegedly performed "outside the scope of the Subcontract," including engaging SGH to perform a peer review analysis of the marine cofferdams. (Fifth Am. Compl. ¶¶ 313-19.) Cashman contends that there are two distinct costs related to analysis performed by SGH—the analysis of RTG's engineering design of

the cofferdams and the analysis with respect to the two-pour placement. (Cashman's Post-Trial Br. 269.)

Cardi argues that Cashman cannot maintain these claims under a contract theory because it materially breached and abandoned the Subcontract. (Cardi's Post-Trial Br. 493-94.) As to the extra work claim related to the peer review, Cardi argues that the peer review was required due to defective work and Cashman's claims of defective design, and that because SGH's review was fundamentally flawed, Cashman is precluded from recovery. *Id.* at 498. Cardi additionally contends that because SGH is not an objective party, but rather an advocate on Cashman's behalf, Cashman is barred from recovery on the claim. *Id.*

An action in quantum meruit "permits recovery of damages 'in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship.'" *Process Engineers & Constructors, Inc. v. DiGregorio, Inc.*, 93 A.3d 1047, 1052 (R.I. 2014) (quoting Black's Law Dictionary 1361-62 (9th ed. 2009)). "'[T]o recover on an action in quantum meruit, it must be shown that the owner derived some benefit from the services and would be unjustly enriched without making compensation therefor.'" *Id.* (quoting *National Chain Co. v. Campbell*, 487 A.2d 132, 135 (R.I. 1985)). "Quantum meruit generally applies 'in a situation in which the plaintiff has provided services to the defendant for which the defendant has refused to pay.'" *Id.* at 1053 (quoting *Parnoff v. Yuille*, 57 A.3d 349, 355 n.7 (Conn. App. Ct. 2012)). As to quasi-contractual actions in general, "a plaintiff must prove that '(1) the plaintiff conferred a benefit on the defendant, (2) the defendant appreciated the benefit, and (3) under the circumstances it would be inequitable for the defendant to retain such benefit without payment of the value thereof.'" *Id.* (quoting *Fondedile, S.A. v. C.E. Maguire, Inc.*, 610 A.2d 87, 97 (R.I. 1992)).

Recently, the Rhode Island Supreme Court reiterated that "'[t]he third prong of the analysis is the most important'—namely, that 'the recipient accepted the benefit under such circumstances that it would be inequitable for [the recipient] to retain the benefit without paying the value thereof.'" *IDC Clambakes, Inc. v. Carney*, 246 A.3d 927, 934 (R.I. 2021) (quoting *South County Post & Beam, Inc.*, 116 A.3d at 211, 212). "'[T]he court must look at the equities of each case and decide whether it would be unjust for a party to retain the benefit conferred upon it without paying the value of such benefit.'" *Id.* (quoting *South County Post & Beam*, 116 A.3d at 212).

The evidence at trial demonstrates that following the discovery of the hanger bracket deviations, RTG performed a "re-analysis" of the as-built brackets. (Trial Ex. 397, at 2.) RTG further requested, due to

> "the time constraints . . . and our preference to minimize the likelihood for problems to occur . . . that the re-analyses be scrutinized as part of a formal peer review now (in addition to any review performed by the Department/Engineer), giving all parties time to discuss and resolve [these] issues, rather than after having a potential problem." (Trial Ex. 5264; *see* Trial Tr. 134:20-23, Jan. 7, 2020 (stating that SGH was aiding RTG in the repair process).)

The record further demonstrates that Mr. Grimaldi suggested to Mr. McNulty that Cashman procure SGH as the peer reviewer of the re-analysis. (Trial Tr. 3:24-5:6, Dec. 3, 2019.) The purpose of the peer review, as understood by Mr. Konicki, was to evaluate or generate repair options for the brackets. (Trial Tr. 98:2-99:3, Feb. 10, 2020.) The record also clearly demonstrates that, after SGH prepared the initial hanger bracket review, Mr. McNulty requested that SGH continue its review with respect to the rest of the cofferdam components. (Trial Tr. 102:2-104:7, Feb. 6, 2020.) Additionally, SGH provided repair proposals, but the designs were rejected based on constructability issues. *See* Trial Ex. 1891, at 1. SGH also reviewed RTG's two-pour proposal and made recommendations regarding the design. (Trial Ex. 668.)

Notwithstanding the potential calculation issues regarding the peer review of the analysis of the hanger bracket loads, there is some evidence in the record that SGH did provide helpful engineering during the repair process. *See id.*; *see also* Cardi's Post-Trial Br. 297 ("SGH did, during the Project, provide some useful engineering services to supplement RT when RT did not have sufficient resources to both fend off SGH's constant attacks and complete the complex and time sensitive design of the so-called two-pour procedure in early 2011."); Trial Tr: 14:7-13, Jan. 23, 2020. However, as the Court has found, even if the repair did correct some purportedly defective work, there is a causal connection between Cashman's deviations and the required repairs. "To recover plaintiff must attribute its loss to something other than its own actions." *Fondedile, S.A.*, 610 A.2d at 97; *see IDC Clambakes, Inc.*, 246 A.3d at 936 (holding that the Court "cannot . . . say that the wrongdoer should be permitted to benefit through a quasi-contractual theory").

The Court held above that Cashman caused Cardi's damages with respect to the cofferdam repairs. Indeed, the initial need for the repair work is a direct result of Cashman's removal of the outer ring of the hanger brackets, and the potential for structural failure resulting from that deviation. Therefore, the Court cannot say that it would be unjust or inequitable for Cardi to retain any benefit it derived from SGH's engineering work with respect to the repairs to or analysis of the cofferdams. *See IDC Clambakes, Inc.*, 246 A.3d at 934. Consequently, Cashman is not entitled to judgment on Count XIV of its Fifth Amended Complaint for extra work related to SGH's engineering work for the marine cofferdams.[39]

[39] As the Court has concluded that Cashman's extra work claim fails with respect to SGH's peer review, it need not analyze Cardi's argument that Cashman abandoned the Subcontract.

D

Cashman Count XVIII: Negligence

Cashman also brings a claim in negligence against Cardi for the provision of defective plans. *See* Fifth Am. Compl. ¶¶ 331-39. The parties view Cashman's Count XVIII claim of negligence in starkly different terms. Cardi argues that all counts relating to an allegation of defective design—Counts III, IV, and XVIII—are claims which depend on a finding of professional negligence, where the "ultimate issue is whether [RTG] acted in accord with the skill that one reasonably expects from a similarly situated engineer" in preparing the plans. (Cardi's Post-Trial Br. 500.) Cardi therefore argues that the claim must be dismissed because Cashman's expert failed to establish that an alleged variation from AASHTO guidelines equaled a breach of the standard of care in preparation of the plans, and therefore, that the plans were defective. *Id.* at 498-500. Additionally, Cardi contends that Cashman has not produced evidence demonstrating that the plans were defective. *Id.* at 496. Cardi also argues that Cashman failed to follow the allegedly defective plans, which precludes it from recovery. *Id.* at 501.

Cashman, on the other hand, argues that its negligence claim, like its claim under Count III for breach of contract, is not meant to be an engineering malpractice claim. (Cashman's Post-Trial Br. 232.) Rather, according to Cashman, its negligence claim relates to Cardi's "lack of due diligence and failure to ensure that it retained an engineer of record that complied with the [contract] specifications." *Id.* at 272. Cashman argues that Cardi breached a duty to act in a commercially reasonable manner to secure a qualified and experienced engineer. *Id.* at 276-77. Cashman asserts that this duty arises independent of the Subcontract, and therefore its negligence claim survives the economic loss doctrine. *Id.* at 275.

In the Fifth Amended Complaint, Cashman alleges that Cardi breached its duty: (1) "by providing incorrect, unbuildable and unsafe designs for the lifting lugs, hanger brackets, and marine cofferdams" and (2) "by failing to provide designs and/or plans to [Cashman] for use on the Project that were prepared with the reasonable care, technical skill, ability and diligence ordinarily required of an architect or engineer in the same or similar circumstances." (Fifth Am. Compl. ¶ 336.) According to the Fifth Amended Complaint, these actions caused damage to Cashman because it was required to remedy the results of the defective designs. *Id.* ¶ 337.

To the extent that Cashman's negligence claim is based on Cardi's alleged provision of defective plans prepared by RTG, this claim is precluded by the economic loss doctrine.[40] Pursuant to the economic loss doctrine, "'a plaintiff is precluded from recovering purely economic losses in a negligence cause of action.'" *Hexagon Holdings, Inc. v. Carlisle Syntec Incorporated*, 199 A.3d 1034, 1042 (R.I. 2019) (quoting *Franklin Grove Corp. v. Drexel*, 936 A.2d 1272, 1275 (R.I. 2007)). "Where there are damages in the construction context between commercial entities, the economic loss doctrine will bar any tort claims for 'purely economic damages.'" *Id.* (quoting *Franklin Grove Corp.*, 936 A.2d at 1275). The Supreme Court has explained that "commercial transactions are more appropriately suited to resolution through the law of contract, than through the law of tort." *Franklin Grove Corp.*, 936 A.2d at 1275.

In support of its position, Cashman cites to *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 636 N.E.2d 503 (Ill. 1994), for the principle that "[w]here a duty arises outside of the contract, the economic loss doctrine does not prohibit recovery in tort for the

[40] The Court notes that Cardi has not specifically addressed the economic loss doctrine with respect to its discussion of Count XVIII, *see* Cardi's Post-Trial Br. 496, but does discuss this doctrine elsewhere in its briefing, with respect to applying strict contract law principles, *see id.* at 517. However, Cashman has fully addressed this issue in its briefing. *See* Cashman's Post-Trial Br. 275. Therefore, the Court will address the issue, which it deems relevant to this claim.

negligent breach of that duty." *Congregation of the Passion*, 636 N.E.2d at 514. The Illinois Supreme Court further held in that case that "[t]he economic loss doctrine does not bar recovery in tort for the breach of a duty that exists independently of a contract." *Id.* at 515.

Although Cashman argues that its negligence claim contemplates a duty arising outside of the bounds of the Subcontract—"to act in a commercially reasonable manner as it relates to due diligence in connection with securing an Engineer-of-Record for the Project"—the allegations in the Fifth Amended Complaint assert, at least in part, that Cardi had a duty with respect to the provision of the plans to Cashman. (Cashman's Post-Trial Br. 276; *see* Fifth Am. Compl. ¶¶ 333-36.) As Cashman has argued, however, a claim exists under the contract for breach of an implied warranty relative to plans furnished by an owner to a contractor. *See Penzel Construction Company, Inc.*, 544 S.W.3d at 226. Cashman has brought this claim in Count III of its Fifth Amended Complaint, and the Court has addressed this claim above. Therefore, because Cashman's damages would involve purely economic damages, and the purported duty arises from an implied warranty in contract, the economic loss doctrine bars Cashman's negligence claim as it pertains to the provision of plans.[41] *See Hexagon Holdings*, 199 A.3d at 1042.

Cashman argues, however, that the negligent act relevant to Count XVIII was Cardi's "hiring/retaining an engineering firm, RTG, and an Engineer-of-Record, Otten, that failed to satisfy the job specific specifications for qualifications/credentials (JS-107) outlined in the Contract Documents." (Cashman's Post-Trial Br. 275.) This duty, according to Cashman, arises independent of the Subcontract, and therefore is not subject to the economic loss doctrine. *Id.* at

[41] As the Court has determined that the economic loss doctrine applies to any negligence claim related to the provision of plans, the Court need not determine whether Cashman adequately elicited a standard of care with respect to RTG's design plans. Consequently, the Court denies Cardi's Rule 52(c) motion with respect to Count XVIII.

276-77. In support of its position, Cashman highlights testimony demonstrating that Mr. Otten did not have the requisite experience outlined in the Marine Cofferdam Specification.[42] *Id.*

"To properly set forth 'a claim for negligence, a plaintiff must establish a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage.'" *Wells v. Smith*, 102 A.3d 650, 653 (R.I. 2014) (quoting *Brown v. Stanley*, 84 A.3d 1157, 1161-62 (R.I. 2014)). A defendant is not liable for negligence "unless the defendant owes a duty to the plaintiff." *Id.* (quoting *Brown*, 84 A.3d at 1162). "Whether a defendant is under a legal duty in a given case is a question of law." *Id.* (quoting *Willis v. Omar*, 954 A.2d 126, 129 (R.I. 2008)). This determination is "'made on a case-by-case basis,'" *id.* (quoting *Willis*, 954 A.2d at 130), and the Court examines "all relevant factors, including the relationship of the parties, the scope and burden of the obligation to be imposed upon the defendant, public policy considerations, and notions of fairness.'" *Id.* (quoting *Gushlaw v. Milner*, 42 A.3d 1245, 1252 (R.I. 2012)).

In essence, Cashman argues that Cardi had a duty to hire an engineer that met all of the qualifications set forth in the job specific marine cofferdam code made part of the contract documents. *See* Trial Ex. 1162, at JS-107. There is no doubt that the contract documents required Cardi to submit the relevant qualifications for both RTG and Cashman to RIDOT. *See id.* Therefore, to the extent there was a duty to conform to this specification, it arose under the contract between RIDOT and Cardi. Cardi did not owe a separate duty to Cashman, outside of the contract, to hire an engineer with the experience required in the provisions of the contract documents.

[42] Cashman's post-trial arguments regarding this claim do not clearly align with the allegations made in its Fifth Amended Complaint. *See* Fifth Am. Compl. ¶¶ 331-39. Cashman's allegations specific to Count XVIII of its complaint make no mention of qualifications or Mr. Otten. *See id.* Rather, the claim is framed around the defective design. In any event, the Court will address Cashman's qualifications argument.

However, to the extent that Cardi had a duty, outside of the contract, with respect to due diligence in hiring an engineer meeting the qualifications set forth in the contract documents, the Court finds that Cashman has failed to demonstrate that Cardi breached such a duty or that the breach resulted in injury to Cashman. To be sure, there is evidence that Cardi did not conduct an extensive investigation into RTG's qualifications prior to entering into a contract for the design of the marine cofferdams. (Trial Tr. 95:7-17, Nov. 13, 2019.) Notwithstanding such evidence, it is undisputed that RIDOT accepted RTG as the engineer on the Project, despite its failure to meet the specific requirements in the marine cofferdam specification. *See* Trial Tr. 65:14-19, Nov. 4, 2019.

Indeed, upon request for further evidence of experience, it was Mr. McNulty who ultimately packaged both RTG and Cashman's relevant qualifications and sent them by email to RIDOT. (Trial Tr. 56:13-57:17, Nov. 4, 2019; Trial Ex. 258; *see* Trial Ex. 1308, at 13; Trial Ex. 1309, at 19.) The credible evidence demonstrates that neither Cashman, RTG, nor Mr. Otten held the requisite experience outlined in the job-specific code. (Trial Tr. 52:17-53:9, Nov. 4, 2019.) However, the record also clearly establishes that the marine cofferdams at issue were unique structures. (Trial Tr. 70:8-22, Nov. 5, 2019.) Mr. Greenleaf testified that "engineering principles that apply to [floating cofferdams] . . . also apply to the various types of structures" with which RTG had experience, and, thus, RTG had "applicable design experience within what they had submitted." *Id.* at 66:7-13. Additionally, the Court also notes that the credible evidence demonstrates that Mr. McNulty worked very closely with Mr. Otten on the design of the marine cofferdams and did not object to Mr. Otten's qualifications until after the hanger brackets became an issue. (Trial Tr. 63:7-64:17, Dec. 3, 2019; Trial Tr. 52:11-14, Feb. 4, 2020.) Therefore, given RIDOT's ultimate approval of RTG as engineer, as well as the unique nature of the cofferdams for

the Project and RTG's past experience, the Court cannot say that Cardi breached a duty to act in a commercially reasonable manner when it hired RTG as its engineer.

Moreover, in order to succeed on its negligence claim, Cashman must demonstrate that any breach of a duty to hire a qualified engineer proximately caused its damages. *See Wells*, 102 A.3d at 653. Cardi points to *Cain v. Aquidneck Consulting Engineers, LLC*, No. NC-2014-0228, 2016 WL 1069897 (R.I. Super. Mar. 14, 2016), in support of its position that Cashman cannot demonstrate proximate cause. (Cardi's Post-Trial Br. 501.) In *Cain*, the court dismissed on summary judgment a negligence claim brought by a homeowner against an engineering firm. *Cain*, 2016 WL 1069897, at *4. The court held that because the plaintiff failed to follow the plans provided by the engineer, "[d]efendant cannot be said to be the proximate cause of Plaintiff's injury." *Id.* (citing *Carpenter v. Murphy*, 4 A.D. 3d 318, 320 (N.Y. App. Div. 2004)). Like the plaintiff in *Cain*, Cashman did not follow the plans provided by the engineer. Furthermore, as the Court has noted, Cashman's argument with respect to the effect of the allegedly defective plans is speculative, particularly in view of the unequivocal evidence of the structural issues caused by the complete removal of the outer ring of the hanger brackets. Also, it is difficult to see how, in light of the discussion regarding the nature of the marine cofferdams here and scrutiny of RTG's experience, a failure to hire an engineer with the qualifications outlined in the contract documents would lead to injury in this case. Therefore, Cashman has failed to establish the elements required to prove its negligence claim by a preponderance of the evidence and Count XVIII is denied and dismissed.

E

Cardi Count II: Negligent Construction

In Count II of its Counterclaim, Cardi alleges that Cashman breached a duty to perform in accordance with accepted construction standards and procedures. (Cardi's Counterclaim ¶¶ 68-70.) Cashman argues that the economic loss doctrine precludes Cardi from recovering on this claim. (Cashman's Post-Trial Br. 278.) The Court agrees. Cardi's claim clearly involves purely economic damages and relates to the same claim it asserted with respect to the Subcontract. *See* Counterclaim ¶¶ 65-66, 68-70. Therefore, this claim is precluded by the economic loss doctrine. *See Hexagon Holdings, Inc.*, 199 A.3d at 1042 (quoting *Franklin Grove Corp.*, 936 A.2d at 1275). Cashman is not liable under Count II of Cardi's Counterclaim.

F

Cardi Count III: Fraud

In Count III of its Counterclaim, Cardi alleges that Cashman "created and concealed defective conditions at the Project and knowingly and fraudulently denied responsibility for its defective work." (Cardi's Counterclaim ¶ 72.) Cashman argues that Cardi did not demonstrate that Cashman made any misrepresentation of fact to Cardi. (Cashman's Post-Trial Br. 279.) If there was a misrepresentation, Cashman contends that Cardi has not shown it relied on that representation. *Id.* at 280. Cashman also points to the fact that it completed its work out in the open and was subject to daily observations from RIDOT. *Id.*

"To establish a prima facie case of common law fraud in Rhode Island, 'the plaintiff must prove that the defendant made a false representation intending thereby to induce plaintiff to rely thereon, and that the plaintiff justifiably relied thereon to his or her damage.'" *Women's Development Corp.*, 764 A.2d at 160 (quoting *Travers v. Spidell*, 682 A.2d 471, 472-73 (R.I.

1996)). A claim for fraudulent concealment requires a showing: "'(1) that the defendant made an actual misrepresentation of fact; and (2) that, in making such misrepresentation, the defendant fraudulently concealed the existence of [the] plaintiff's causes of action.'" *Hyde v. Roman Catholic Bishop of* Providence, 139 A.3d 452, 465-66 (R.I. 2016) (quoting *Ryan v. Roman Catholic Bishop of Providence*, 941 A.2d 174, 182 (R.I. 2008)). Cardi's allegations in its Counterclaim are somewhat cursory as to this claim, and Cardi has not specifically addressed this claim in its post-trial briefing. *See* Counterclaim ¶¶ 72-73. However, the Court agrees with Cashman's position with respect to this claim.

While the evidence demonstrates that Cashman's actions constituted unauthorized deviations, Cardi has failed to produce evidence that Cashman intentionally concealed these deviations. In fact, the trial evidence demonstrates that RIDOT engineering technicians completed daily activity reports submitted to Mr. Studley for his review. (Trial Tr. 106:6-11, Nov. 5, 2019.) Furthermore, RIDOT discovered and notified Cardi of deviations it observed at all phases of the project. (Trial Ex. 1661.) With respect to the hanger brackets, photographs showing the removal of the ring date back to a RIDOT activity report on June 16, 2010. *See* Trial Ex. 1473. Cashman's failure to report the deviations constitutes a breach of contract, but the Court cannot say that such actions constitute fraud. *See Hyde*, 139 A.3d at 465-66. Consequently, Cardi's Counterclaim Count III is denied and dismissed.

G

Cardi Count IV: Breach of Good Faith and Fair Dealing

Cardi also brings a claim against Cashman for breach of the covenant of good faith and fair dealing, asserting simply that Cashman's conduct constituted a breach that damaged Cardi. (Cardi's Counterclaim ¶¶ 74-76.) Cashman argues that Cardi's claim fails because breach of a

covenant of good faith and fair dealing is not an independent cause of action in Rhode Island. (Cashman's Post-Trial Br. 286-87.)

"It is well settled that 'virtually every contract contains an implied covenant of good faith and fair dealing between the parties.'" *Premier Home Restoration, LLC v. Federal National Mortgage Association*, 245 A.3d 745, 749-50 (R.I. 2021) (quoting *Ferreira v. Child & Family Services*, 222 A.3d 69, 76 (R.I. 2019)). "This implied covenant provides a safeguard so that contractual aims are satisfied and parties do not act to 'destroy[] or injure[] the right of the other party to receive the fruits of the contract.'" *Id.* at 750 (quoting *McNulty v. Chip*, 116 A.3d 173, 185 (R.I. 2015)). This claim is not an independent cause of action, but "must be connected to a breach-of-contract claim." *Id.*

"The applicable standard in determining whether one has breached the implied covenant of good faith and fair dealing is 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). "[W]hile every breach of the implied covenant may give rise to a breach of contract claim, not every breach of contract is necessarily a breach of the implied covenant of good faith and fair dealing." *Id.* at 330 (finding that although defendant was liable for breach of contract it was not liable on a good faith and fair dealing claim where "[t]he combination of erroneous legal advice and . . . legitimate business concerns led to the violation of the [a]greement").

This Court has found that Cashman routinely deviated from the plans throughout the Project, and that these deviations related to several components of the cofferdams. *See* Trial Exs. 271, 620, 1701. Furthermore, some of these deviations affected the structural integrity of the cofferdams. *See, e.g.*, Trial Tr. 116:12-16, Feb. 4, 2020. Cashman's actions, as related to the Subcontract, were "unreasonable." *See Ross-Simons of Warwick, Inc.*, 66 F. Supp. 2d at 329.

Moreover, it cannot be said that the deviations from the Subcontract were made based on "legitimate business concerns." *See id.* at 330. Therefore, Cardi is also entitled to judgment on Count IV of its Counterclaim for breach of the covenant of good faith and fair dealing.

H

Cardi Count V: Western Surety

Cardi brings a claim against Cashman's surety, Western, for damages related to Cashman's failure to perform under the Subcontract.[43] (Counterclaim ¶¶ 78-80.) Cardi alleges that it made a demand upon Western on December 8, 2010, and that, "[d]espite demand, Western has failed and refused to pay Cardi the damages suffered to date" as well as damages Cardi expects it will incur. *Id.* ¶ 79.

The performance bond provides that "[w]henever [Cashman] shall be, and be declared by [Cardi] to be in default under the subcontract, [Cardi] having performed [Cardi's] obligations thereunder[,]" Western held three options:

> "(1) Surety may promptly remedy the default subject to the provisions of paragraph 3 herein, or;
> "(2) [Cardi] after reasonable notice to Surety may, or Surety upon demand of [Cardi] may arrange for the performance of [Cashman's] obligation under the subcontract subject to the provisions of paragraph 3 herein;
> "(3) The balance of the subcontract price, as defined below, shall be credited against the reasonable cost of completing performance of the subcontract. If completed by [Cardi], and the reasonable cost exceeds the balance of the subcontract price[,] Surety shall pay to [Cardi] such excess, but in no event shall the aggregate liability of the Surety exceed the amount of this bond. . . ." (Trial Ex. 1562A.)

[43] Western filed a motion pursuant to Rule 52(c) on May 5, 2020, following the close of trial. Cardi objected to the motion on procedural grounds. The substantive arguments from that motion have also been addressed in the Post-Trial Briefing. Given the current posture of the case, the Court shall make its findings of fact and conclusions of law pertaining to this claim under Rule 52(a), and notes that these findings and conclusions would be the same were it to decide the claim under Rule 52(c). *See Broadley*, 939 A.2d at 1021 (stating that a finding pursuant to Rule 52(c) must "comport with the requirements in Rule 52(a)").

The performance bond also requires that suit be initiated within two years following the final payment under the subcontract. *Id.*

On October 29, 2010, Cashman informed Cardi that it believed "any fix or modification to the design is outside of our scope of work" under the Subcontract. (Trial Ex. 1833, at 5.) Cashman and Cardi proceeded to exchange letters regarding the responsibility for the repair. *See* Trial Exs. 422, 1857, 1862. RTG began preparing a repair plan following the October 18, 2010 meeting. (Trial Ex. 397.)

On December 8, 2010, Cardi declared Cashman in default of the Subcontract and demanded damages and indemnity by letter. (Trial Ex. 1899, at 1.) In that communication, Cardi stated that it "stands ready to commence remedial measures to correct defective work performed by Cashman, unless immediate assurances are provided for the performance by Cashman of those remedial measures, at Cashman's sole cost and expense." *Id.* In the same letter, Cardi also gave notice of default to Western and made a demand that Western "immediately advise Cardi, no later than five days from the date of th[e] letter, as to its intentions regarding the remedial work and damages at issue." *Id.* at 3. Furthermore, Cardi informed the parties that RTG had prepared certain remedial plans, which were awaiting approval from RIDOT. *Id.* at 2. The next day, Western responded to Cardi's letter by requesting certain documents so it could perform an investigation of the claim. (Trial Ex. 1904, at 1.) Western also wrote that it "expects [Cardi] to mitigate any and all damages it may incur and protect the contract funds so as not to cause a loss to Western Surety Company." *Id.* at 2.

One of the repairs, involving concrete mini beams, was approved on December 16, 2010. *See* Trial Ex. 504. Cardi began this repair work itself, but shortly thereafter the repair work was paused after further deviations were discovered. (Trial Tr. 23:12-24:1, Jan. 15, 2020.) In a January

7, 2011 letter, Cardi again made a demand upon Western and Cashman, following discovery of additional deviations, that the parties provide reasons why Cashman should be "allowed to continue to perform work on this project." (Trial Ex. 2005.) On January 18, 2011, Cardi informed Cashman and Western that because they had not provided a "suitable response" to Cardi's assertion that Cashman was not fit to perform the repairs, "[a]ll necessary repairs or modifications to the marine cofferdams will . . . be performed by Cardi and its subcontractors at Cashman's sole cost and expense." (Trial Ex. 2036, at 2.)

RTG continued to work on a solution for the remedial work and finalized repair plans were submitted on February 17, 2011. *See* Trial Exs. 749, 750. On February 28, 2011, Cardi informed both Western and Cashman that it would be moving forward with the repairs to the marine cofferdams. (Trial Ex. 2117.) Ultimately, on March 14, 2011, Western responded to the claim under the bond. (Trial Ex. 2150.) Western stated,

> "Our review indicates that the parties dispute, among other things, the party responsible for the problems and delays concerning the marine cofferdams at piers 4, 5 and 6 of the referenced project. According to our review, [Cashman] constructed the piers per the plans and specifications provided them by RT Group, the engineering firm of record, retained by [Cardi]. An independent review of RT Group's design by Simpson Gumpertz & Heger revealed that the initial design by RT Group was inadequate, regardless of any subsequent modification." *Id.*

Western ultimately concluded that "[Cashman] has a good faith defense to the claim, and under the circumstances Western Surety Company cannot state that [Cardi's] claim is just." *Id.* Western further "strongly urge[d] the parties to attempt to resolve this matter between themselves" and advised Cardi that Western "expects [Cardi] to mitigate any and all damages it may incur." *Id.*

Also of note, early in this litigation, Western moved for partial summary judgment with respect to Cardi's claim on the performance bond. (Trial Ex. D to Western's Rule 52(c) Motion.)

In that motion, Western sought judgment that it was not liable under the performance bond for damages related to Cashman's Type F concrete work or for "any and all alleged indirect . . . consequential, delay, liquidated, disincentive and lost incentive damages." *See id.* at 22-23.

In a bench decision, an honorable justice of this Court determined that, with respect to the Type F concrete issue, Western was entitled to summary judgment because Cardi had not provided Western with reasonable notice, and "thus, Western was not in a position in any way to protect or minimize damages which it now is asked to pay pursuant to the bond." (Trial Ex. E to Western's Rule 52(c) Motion, at 11.) The Court further addressed an issue with respect to "type damages the Court here refers to indirect, consequential, delay, liquidated, disincentive, and lost incentive damages." *Id.* at 11-12. On that issue, the Court ruled that "the obligation of the surety is coincident with the obligation of the principal so long as the provisions and terms have been faithfully performed and so long as the surety has no available escape, as the Court already has found it has, with respect to the Type F concrete damages." *Id.* at 12. An order memorializing the Court's decision entered on August 14, 2015, granting in part and denying in part Western's motion. (Trial Ex. F to Western's Rule 52(c) Motion.) The order specified that "Western is not liable under Performance Bond No. 929441133 for any of Cardi Corporation, Inc.'s alleged Direct, Indirect, Consequential, Liquidated, Disincentive and Lost Incentive damages arising from Cashman's placement of Type F concrete at Pier 6[.]" *Id.* at 2. Further, the order indicated that Western's motion for summary judgment was denied in part "to the extent that Partial Summary Judgment is sought as to alleged . . . damages related to Marine Cofferdam issues." *Id.*

In short, Western's attack on this claim is two-fold: (1) that a 2015 ruling on a motion for summary judgment discharges its liability on the bond fully; and (2) that Cardi's corrective action on the cofferdams occurred prior to notice to Western, which took away its opportunity to mitigate

damages, and therefore precludes the claim. (Cashman's Post-Trial Br. 289-96.) The Court first must turn to the prior ruling granting judgment in part in favor of Western and then will analyze whether Cardi has met its obligations under the bond sufficient to render Western liable.

1

Prior Summary Judgment Ruling

Western argues that "once there was a discharge of the Bond, it was a full and final discharge which means that Cardi's later arising Cofferdam Claim was also barred." (Cashman's Post-Trial Br. 292.) Western argues that it is the law of the case that the bond is "void and fully discharged as a matter of law." *Id.* at 293. Western further asserts that it did not move for summary judgment with respect to the cofferdam claim. *Id.* at 295.

Cardi counters that Western's 2015 Motion for Summary Judgment, contrary to its assertion, "plainly sought a ruling. . . that Western was not liable to Cardi for Cardi's 'indirect' Cofferdam damages[.]" (Cardi's Post-Trial Br. 473.) Cardi asserts that the 2015 ruling determined that "Western is liable for all Cofferdam damages (because Western's liability is coincident with Cashman's liability to Cardi)," and therefore, "to the extent the Court finds that Cashman is liable to Cardi for any Cofferdam damages, the law of the case is that Western is equally liable to Cardi." *Id.* at 474. Cardi further contends that the language of the bond contradicts its argument that discharge of its liability as to a different claim on the Project results in a full discharge of the bond. *Id.* at 475.

"'The law of the case doctrine provides that, after a judge has decided an interlocutory matter in a pending suit, a second judge, confronted at a later stage of the suit with the same question in the identical manner, should refrain from disturbing the first ruling.'" *Laprocina v. Lourie*, 250 A.3d 1281, 1285 (R.I. 2021) (quoting *Lynch v. Spirit Rent-A-Car, Inc.*, 965 A.2d 417,

424 (R.I. 2009)). "[T]he law of the case doctrine 'is a flexible rule' and 'may be disregarded when a subsequent ruling can be based on an expanded record.'" *Id.* (quoting *Lynch*, 965 A.2d at 424.) Moreover, "[w]hen presented with an expanded record, it is within the trial justice's sound discretion whether to consider the issue." *Id.* (quoting *Felkner v. Rhode Island College*, 203 A.3d 433, 445 (R.I. 2019)).

Additionally, "[t]he nature and extent of a surety's liability on a performance bond is governed by the terms of the bond." *Marshall Contractors, Inc. v. Peerless Insurance Co.*, 827 F. Supp. 91, 93-94 (D.R.I. 1993). The language of the bond is to be strictly construed. *Narragansett Pier R. Co. v. Palmer*, 70 R.I. 298, 302, 38 A.2d 761, 763 (1944) ("In the absence of ambiguity, the extent of the liability of the surety on a common-law bond is determined solely by the language of the bond."). Where the Subcontract is "incorporated by reference into the Performance Bond, they should be construed together." *Raito, Inc. v. Cardi Corp.*, No. PB 07-3235, 2010 WL 1422002, at *2 (R.I. Super. Apr. 5, 2010).

Both parties argue that the law of the case doctrine renders a ruling in its favor. Thus, it is necessary to examine the scope of the prior ruling with respect to Western's liability. The prior hearing justice made several clear rulings: (1) that Western received notice of the problem with the Type F concrete "long after the problem had been cured by Cardi"; (2) that "reasonable notice is a prerequisite [to recovery on the bond] and that no reasonable notice here was given"; (3) that Western was prejudiced by the fact that it could not perform corrective action and minimize its damages; and (4) thus, "with respect to the concrete issue, the Type F concrete issue, Cardi has no claim against Western." (Trial Ex. E to Western's Rule 52(c), at 8-11.) The hearing justice also rejected Western's argument that indirect damages were not recoverable under the bond, holding that "the obligation of the surety is coincident with the obligation of the principal so long as the

provisions and terms have been faithfully performed and so long as the surety has no available escape, as the Court already has found it has, with respect to the Type F concrete damages." *Id.* at 12. It is clear from reading the decision that the hearing justice discharged Western's liability with respect to damages for the Type F concrete remedial measures. *See id.* However, nowhere in the hearing justice's decision is there a discussion regarding whether the bond was fully discharged by this ruling. In fact, the order which subsequently entered expressly denied the motion with respect to indirect damages from the marine cofferdam issues. (Trial Ex. F to Western's Rule 52(c) Motion.) While it is clear that the prior hearing justice's ruling is the law of the case with respect to the Type F concrete claim, the Court finds that this ruling did not extend beyond that issue with respect to Western's scope of liability.

Furthermore, the language of the bond clearly provides that "if [Cashman] shall promptly and faithfully perform said subcontract, then this obligation shall be null and void; *otherwise it shall remain in full force and effect.*" (Trial Ex. 1562A (emphasis added).) "As a general proposition, the true performance bond requires a surety to guarantee the performance through completion of the underlying contract." *National Fire Insurance Co. of Hartford v. Fortune Construction Co.*, 320 F.3d 1260, 1274 (11th Cir. 2003). While Western is not liable for certain obligations under the bond due to Cardi's failure to meet its obligations with respect to notice of default for Type F concrete, this does not fully discharge its liability on the bond for other breaches of the Subcontract, so long as Cardi has met its prerequisites to recovery on the bond.[44]

[44] Cashman points to a recent bench decision rendered by a justice of this Court in *Providence Builders, LLC v. Costa Brothers Masonry, Inc.*, PC-2019-7689, to support the proposition that a performance bond is "discharged *in toto*." (Cashman's Post-Trial Br. 300.) In that decision, the hearing justice clearly found that the plaintiff's action in hiring a replacement contractor prior to declaring the subcontractor in default violated the requirement under the bond. (Trial Ex. 1 to Cashman's Post-Trial Br., at 11.) This matter is factually distinguishable, as Cardi ultimately performed the remedial work itself after declaring Cashman in default. Additionally, Western

2

Liability for Cofferdam Damages

In order to recover for damages related to the cofferdam repair, Cardi must demonstrate that it met its obligations under the bond. *See* Trial Ex. 1562A; *see also Raito*, 2010 WL 1422002, at *4-5. As the prior hearing justice found, "the obligation of the surety is coincident with the obligation of the principal so long as the provisions and terms have been faithfully performed and so long as the surety has no available escape . . . ." (Trial Ex. E to Western's Rule 52(c) Motion, at 12.) Clearly, the plain terms of the bond require Cardi to provide notice of Cashman's default. *See* Trial Ex. 1562A. Upon notice of default, Western may choose to "promptly remedy the default" itself, arrange for Cashman to remedy the default, or elect to allow Cardi to remedy the default and pay the "reasonable cost exceed[ing] the balance of the subcontract price." *See* Trial Ex. 1562A, at §§ 1, 2, 3.

In its December 8, 2010 letter, Cardi clearly and unequivocally declared Cashman to be in default of the Subcontract, gave Western notice of this declaration, and demanded that Western inform Cardi "as to its intentions regarding the remedial work and damages at issue." (Trial Ex. 1899.) Thus, Cardi satisfied one of its obligations under the bond. *See* Trial Ex. 1562A; *see also Balfour Beatty Construction, Inc. v. Colonial Ornamental Iron Works, Inc.*, 986 F. Supp. 82, 86 (D.Conn. 1997) ("Performance bond requirements for notice of default and demand that the surety step in and perform under the bond must be met before an obligee can recover damages under the

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particularly highlights the trial justice's reference to the fact that the bond is fully discharged. (Trial Ex. 1 to Cashman's Post-Trial Br., at 12; Cashman's Post-Trial Br. 302.) However, the trial justice in that case found that the default related specifically to masonry work, which was the performance guaranteed under the bond. (Trial Ex. 1 to Cashman's Post-Trial Br., at 12.) Here, in contrast, Cashman's scope of work under the Subcontract is multi-faceted and wide-ranging. Furthermore, there is no specific discussion in *Providence Builders* as to whether a bond must be discharged in full. Consequently, the Court finds this decision to be inapplicable to the case at bar.

performance bond."). However, "'an obligee's action that deprives a surety of its ability to protect itself pursuant to performance options granted under a performance bond constitutes a material breach, which renders the bond null and void.'" *Hunt Construction Group, Inc. v National Wrecking Corp.*, 542 F. Supp. 2d 87, 92 (D.C. 2008) (quoting *St. Paul Fire & Marine Insurance Co. v. City of Green River, Wyoming*, 93 F. Supp. 2d 1170, 1178 (D.Wy. 2000)); *see also Elm Haven Construction Limited Partnership v. Neri Construction LLC*, 376 F.3d 96, 101 (2nd Cir. 2004) (finding that a plaintiff failed to meet the requirements of a performance bond where it hired a replacement subcontractor five weeks prior to declaring default).

Western argues that Cardi and RTG began working "unilaterally" on a plan to remedy the hanger bracket issues in October 2010, two months prior to Cardi's notice of default to Western. (Cashman's Post-Trial Br. 290.) Western also points to several letters exchanged between Cardi and Cashman, particularly noting that one of these letters asserted both that "Cashman was unfit to perform further construction work on the project yet, at that same time, required that Cashman continue to participate in the engineering of required repair and modifications relating to the Cofferdam Claim." *Id.* at 291. Cardi, on the other hand, argues that Western had ample time to "step in and complete Cashman's work" following the December 8, 2010 letter declaring Cashman in default. (Cardi's Post-Trial Br. 469.) Cardi also contends that it produced no evidence at trial demonstrating how it was prejudiced or not given an opportunity to investigate. *Id.* at 478.

After review of the trial evidence, the Court cannot say that Cardi's actions "deprive[d Western] of its ability to protect itself pursuant to performance options granted under [the] performance bond." *Hunt Construction Group, Inc.*, 542 F. Supp. 2d at 92 (internal quotation omitted). In the December 8, 2010 letter, Western was not only informed of the default, but also that repair plans had been prepared by RTG and were, at that time, "awaiting approval by RIDOT."

(Trial Ex. 1899, at 2.) Cardi made clear that it intended to move quickly to perform remedial work unless Cashman or Western provided assurances that it would perform the work. *Id.* Therefore, Western could have notified Cardi of its intent to perform the remedial work or require Cashman to perform the remedial work, as was provided for under the performance bond. *See* Trial Ex. 1562A.

Furthermore, while the evidence demonstrates that Cardi did commence some repair work shortly following the notice of default, after the "mini beam" plan was approved, this work ultimately did not preclude Western from enforcing its rights under the bond. Cardi paused the repair work following discovery of further deviations, and more remedial plans were designed and implemented after February 28, 2011. *See* Trial Exs. 749, 750, 2117. Moreover, Cardi's January 7, 2011 letter did not interfere with Western's right to have Cashman perform the repairs; rather, it required statements from Western or Cashman as to why Cashman should be allowed to perform repairs, given the discovery of further deviations. *See* Trial Ex. 2005. Cardi informed Western of its intent to perform the repair work itself after Western did not provide a response to its January 7, 2011 demand. *See* Trial Ex. 2036, at 2. At no time between December 8, 2010 and February 28, 2011 did Western inform Cardi that it intended to (a) remedy the default itself, as provided for in Section (1) of the performance bond, or (b) arrange for Cashman to remedy the default, as provided for in Section (2) of the bond.[45] *See* Trial Ex. 1562A. In fact, Western ultimately stated that it could not find that Cardi's claim was "just" given the dispute about liability for the damages. (Trial Ex. 2150, at 1.) Western also asserted that it "underst[ood] that remedial work has begun or is about to begin at the project site[,]" and that Western "expects [Cardi] to mitigate any and all

[45] Moreover, this situation is markedly different than the Type F concrete claim, where a justice of this Court found that Western was not notified of the default until well after Cardi had finished the repairs. *See* Trial Ex. E to Western's Rule 52(c) Motion, at 8.

damages it may incur." *Id.* Consequently, the Court finds that Cardi fulfilled its obligations under the bond following Cashman's default on the Subcontract and therefore is entitled to judgment on Count V of Cardi's Counterclaim.

I

Wrongful Termination

Cashman contends that Cardi wrongfully terminated Cashman, which discharges Cashman and Western from all obligations. (Cashman's Post-Trial Br. 306.) Cashman also argues that Cashman is entitled to attorneys' fees under the Subcontract. *Id.* at 309. Cardi argues that, as a threshold matter, this claim is not contained within Cashman's Fifth Amended Complaint and therefore is not before the Court. (Cardi's Post-Trial Br. 504.) Rule 8(a) of the Superior Court Rules of Civil Procedure mandates that a pleading "'shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks.'" *Rhode Island Mobile Sportfishermen, Inc.*, 59 A.3d at 119 (quoting Super. R. Civ. P. 8(a)). Our Supreme Court has often stated that the underlying rationale for this requirement is the necessity of "'[t]he pleading . . . provid[ing] the opposing party with fair and adequate notice of the type of claim being asserted.'" *Rhode Island Mobile Sportfishermen, Inc.*, 59 A.3d at 119 (quoting *Gardner v. Baird*, 871 A.2d 949, 953 (R.I. 2005)) (further quotation omitted). A review of the Fifth Amended Complaint reveals no claim by Cashman for wrongful termination against Cardi, nor any language indicating an intention to bring such a claim sufficient to give adequate notice to Cardi. Additionally, Cashman never sought leave to amend its operative pleading to include such a claim. Consequently, Cashman's allegations of wrongful termination are not properly before this Court.

However, even were Cashman's wrongful termination allegations properly set forth within its Fifth Amended Complaint, they are of no moment. "Rhode Island is an employment at-will state and . . . in the absence of an employment agreement, an employee has no right to continued employment and is 'subject to discharge at any time for any permissible reason or for no reason at all.'" *New England Stone, LLC v. Conte*, 962 A.2d 30, 33 (R.I. 2009) (quoting *Galloway v. Roger Williams University*, 777 A.2d 148, 150 (R.I. 2001)) (further quotations omitted). Where there is an employment agreement, this Court must construe the clear and unambiguous terms of that contract as written. *See New England Stone, LLC*, 962 A.2d at 33-34 (citing *Rivera v. Gagnon*, 847 A.2d 280, 284 (R.I. 2004)).

Under the terms of the Subcontract between these parties, upon default, Cardi had two options: either terminate the agreement or allow the subcontractor to "continue the work in which event he and his sureties shall be liable to Contractor . . . for any actual damages suffered by the contractor . . . ." (Trial Ex. 1303, at 10.) This Court finds that Cardi's argument that it clearly gave notice of default and did not terminate Cashman is supported by ample evidence in the record. *See* Cardi's Post-Trial Br. 504-05.

In its December 8, 2010 letter, as detailed *supra*, Cardi declared a formal default by Cashman and Western, stating that the letter would "constitute a notice of default, a demand for damages and indemnity[.]" (Trial Ex. 1899, at 1.) This letter contained no termination language. *See id.* at 1-3. Furthermore, in all of its continuing correspondence with Cashman leading up to Cardi's removal of the cofferdams, Cardi's letters consistently stated that Cashman was "in default" and was responsible for the remedial work due to its unauthorized modifications. *See, e.g.*, Trial Exs. 1954, 1966, 2005, 2036, 2270. Importantly, Cardi's December 23, 2011 letter not only notified Cashman that Cardi would complete the removal of the marine cofferdams, given

Cashman's numerous refusals to perform work and demands for premature payment, but also stated that Cashman had been mistaken in stating that it "had been terminated by Cardi" because the "December 8th letter . . . contains no termination language." (Trial Ex. 2270, at 2.) Mr. Cardi's credible testimony at trial was also that Cardi did not terminate Cashman. (Trial Tr. 25:21-26:1, 37:9-38:16, 47:7-13, Nov. 8, 2019.)

Cashman argues that, by "preclud[ing] Cashman from completing its scope of work on the Project[,]" Cardi effectively or constructively terminated Cashman, which termination was wrongful under the terms of the Subcontract. (Cashman's Post-Trial Br. 309-10.) However, this argument is unavailing because, even had Cardi terminated Cashman, such termination would not have been wrongful, given the determinations made by this Court regarding Cashman's material breach of the Subcontract. *See* Trial Ex. 1303. Consequently, this Court finds that Cashman's improperly pleaded claim of wrongful termination is without merit.

IV

Conclusion

For the reasons stated herein, the Court concludes that judgment shall enter for Cardi and against Cashman on the issue of liability with respect to Count I of its Counterclaim, breach of contract, and Count IV, breach of good faith and fair dealing. Judgment shall also enter for Cardi against Western Surety with respect to Count V of its Counterclaim, performance bond. Furthermore, the following claims asserted by Cashman against Cardi are denied and dismissed: Count I, breach of contract—failure to pay; Count II, unjust enrichment; Count III, breach of contract—defective hanger bracket design; Count XIV, breach of contract/quantum meruit—extra work—analysis of cofferdam design; and Count XVIII, negligence—provision of defective

designs. Additionally, Cardi's counterclaims against Cashman for negligent construction, Count II, and fraud, Count III, are denied and dismissed.

Counsel shall prepare the appropriate order.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Cashman Equipment Corp. v. Cardi Corporation, Inc. v. Western Surety Company, et al.**
CASE NO:	**PB-2011-2488**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**September 20, 2021**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Plaintiff:	**See attached**
For Defendant:	**See attached**

Cashman Equipment Corporation, Inc.
vs.
Cardi Corporation, Inc., et al.
vs.
Western Surety Company, et al.

C.A. No. PB-2011-2488

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