

**BUSINESS CALENDAR (STERN, J.)
HEARING DATE: JANUARY 21, 2025 @ 9:30AM**

STATE OF RHODE ISLAND
PROVIDENCE COUNTY

SUPERIOR COURT

STATE OF RHODE ISLAND,

Plaintiff,

v.

C.A. No. PC-2024-04526

AECOM TECHNICAL SERVICES, INC.,
AETNA BRIDGE COMPANY,
ARIES SUPPORT SERVICES INC.,
BARLETTA HEAVY DIVISION, INC.
BARLETTA/AETNA I-195 WASHINGTON
BRIDGE NORTH PHASE 2 JV,
COLLINS ENGINEERS, INC.
COMMONWEALTH ENGINEERS &
CONSULTANTS, INC.,
JACOBS ENGINEERING GROUP, INC.
MICHAEL BAKER INTERNATIONAL, INC.,
PRIME AE GROUP, INC.
STEERE ENGINEERING, INC.,
TRANSYSYSTEMS CORPORATION, and
VANASSE HANGEN BRUSTLION, INC.

Defendants.

**BARLETTA/AETNA I-195 WASHINGTON BRIDGE NORTH PHASE 2 JV'S ("JV")
REPLY TO THE STATE OF RHODE ISLAND'S ("STATE") OBJECTION
("OBJECTION") TO JV'S RULE 12 MOTION TO DISMISS ("MOTION")**

TABLE OF CONTENTS

I. ALTHOUGH THE STATE HAS COMBINED ITS OBJECTIONS TO THE DEFENDANTS’ MOTIONS INTO ONE “CONSOLIDATED” OBJECTION, THE LIABILITY OF THE JV MUST BE SEPARATELY ANALYZED ACCORDING TO THE SPECIFIC REQUIREMENTS OF THE RFP..... 1

II. THE CONTRACT MUST BE CONSIDERED FOR THE PURPOSES OF THE JV’S MOTION TO DISMISS..... 2

III. THE STATE’S OWN ADMISSIONS DEFEAT THE STATE’S CLAIMS..... 3

IV. BREACH OF CONTRACT COUNT XV IS NOT CONSISTENT WITH OR SUPPORTED BY THE CONTRACT TERMS, WHICH IS FATAL TO THE CLAIM..... 6

V. REHABILITATION OF THE TIE-DOWNS AT PIERS 6 AND 7 WERE NOT INCLUDED IN THE BTC AND WERE NOT IN THE SCOPE OF WORK OF THE PROJECT AS DEFINED SOLELY BY THE STATE. 7

VI. THE ECONOMIC LOSS RULE APPLIES TO THE STATE..... 8

VII. TAXPAYERS WILL BEAR THE BURDEN IF THIS COURT EXEMPTS THE STATE FROM THE ECONOMIC LOSS RULE..... 10

VIII. THE STATE’S ALLEGATIONS FAIL TO SUPPORT A CLAIM FOR NEGLIGENT MISREPRESENTATION..... 11

IX. CONCLUSION..... 12

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Barnes v. R.I. Public Trans. Auth.</i> , 242 A.3d 32 (R.I. 2020)	10
<i>Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist.</i> , 881 P.2d 986 (Wash. 1994).....	11
<i>Bos. Inv. Prop. No. 1 State v. E.W. Burman, Inc.</i> , 658 A.2d 515 (R.I. 1995)	9, 11
<i>Chase v. Nationwide Mut. Fire Ins. Co.</i> , 160 A.3d 970 (R.I. 2017)	2
<i>DiLuglio v. Providence Auto Body, Inc.</i> , 755 A.2d 757 (R.I. 2000)	4
<i>EDC Inv., LLC v. UTGR, Inc.</i> , 275 A.3d 537 (R.I. 2022)	2, 3
<i>Fanning & Doorley Const. Co. v. Geigy Chem. Corp.</i> , 305 F. Supp. 650 (D.R.I. 1969).....	5
<i>Franklin Grove Corp. v. Drexel</i> , 936 A.2d 1272 (R.I. 2007)	9
<i>Gardner v. Baird</i> , 871 A.2d 949 (R.I. 2005)	10
<i>Hyatt v. Village House Convalescent Home, Inc.</i> , 880 A.2d 821 (R.I. 2005)	9, 10
<i>Martin v. Lilly</i> , 505 A.2d 1156 (R.I. 1986)	4
<i>N. Farm Home Owners Ass'n, Inc. v. Bristol Cnty. Water Auth.</i> , 315 A.3d 933 (R.I. 2024)	9, 10, 12
<i>Rhode Island Econ. Dev. Corp. v. Wells Fargo Secs.</i> , No. PB-12-5616, 2013 WL 4711306 (R.I. Super. Aug. 28, 2013)	12
<i>Spring Motors Distributors, Inc. v. Ford Motor Co.</i> , 489 A.2d 660 (N.J. 1985).....	11

United States v. Spearin,
248 U.S. 132 (1918) 5

Other Authorities

3 Bruner & O'Connor Construction Law § 9:91 5

Super. R. Civ. P. 12(f)..... 7

I. ALTHOUGH THE STATE HAS COMBINED ITS OBJECTIONS TO THE DEFENDANTS' MOTIONS INTO ONE "CONSOLIDATED" OBJECTION, THE LIABILITY OF THE JV MUST BE SEPARATELY ANALYZED ACCORDING TO THE SPECIFIC REQUIREMENTS OF THE RFP.

The State has taken great liberty in combining objections to all Defendants' motions. In doing so, the State attempts to blur the lines between the obligations of the respective moving Defendants, as though such Defendants are similarly situated. The JV is a design-build entity who was engaged by the State to rehabilitate the Washington Bridge under the specific terms of the Request for Proposals ("RFP"), for a design and construction project known as the I-195 Washington North Phase 2 Project ("Project"). The RFP required all bidders to conform with the Base Technical Concept ("BTC"), the technical requirements of the Project. Motion Ex. 3, RFP, Part 1 – Instructions to Proposers at 18 (3.1 General Description of Base Technical Concept) ("The documents submitted by a Proposer shall be based on the BTC."). Because the JV had no role in creating the BTC or in evaluating whether the Washington Bridge could be rehabilitated or needed to be replaced, it is highly prejudicial for the State to combine its Objection and blur the lines of responsibility in the process.

The JV, in contrast to the other Defendants, was never engaged to perform the tasks of "research and review, inspection, performance evaluation, or repair recommendation for the Washington Bridge." While the quoted words appear in paragraph 165 of the State's Complaint, *they do not appear anywhere in the RFP or the JV's other contract documents (together, the "Contract") and were never part of the JV's responsibilities.*¹ The State provided the JV with the BTC, inspections, and analysis prepared by some of the co-defendants, which the State now claims were deficient for the JV and other bidders to rely upon for rehabilitation of the Washington

¹ The "Contract (Contract Documents)" include the "BTC plans, RFP Part 2...RFP Part 3...and the final [JV's] Proposal accepted by the State." Motion Ex. 2, RFP, Part 3 – Terms and Conditions, Appendix C (Abbreviations, Definitions And Terms).

Bridge. These documents are commonly known in the construction industry as “bridging documents,” which are intended to provide specific information to induce competitive bids for well-defined State-procured projects. The RFP rehabilitation process was in stark contrast to the current open design competition being used for replacement of the Washington Bridge. In short, the JV agreed to advance the BTC as required by the RFP, not evaluate or design a replacement bridge in an open design competition.

II. THE CONTRACT MUST BE CONSIDERED FOR THE PURPOSES OF THE JV’S MOTION TO DISMISS.

All of the State’s factual allegations are expressly linked to the Contract for the State’s procurement of the Project. The State, in its Objection, seemingly does not dispute this. Instead, the State asks this Court not to consider the Contract for the purposes of the JV’s Rule 12(b)(6) Motion. (Pl. Obj. at 15). The State erroneously contends that, if the Court considers the Contract, the JV’s Motion “automatically” converts to one for summary judgment. *Id.* The State misstates the law.

Under the facts of this case, the Court may lawfully consider the Contract without converting the JV’s Motion to one for summary judgment. Rhode Island law provides:

[N]otwithstanding our general rule that, when a motion to dismiss includes documents not expressly incorporated in a complaint, it automatically converts to one for summary judgment, **we have acknowledged a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint.**

EDC Inv., LLC v. UTGR, Inc., 275 A.3d 537, 542–43 (R.I. 2022) (internal citations and quotations omitted) (emphasis added); *see Chase v. Nationwide Mut. Fire Ins. Co.*, 160 A.3d 970, 974 (R.I.

2017) (stating that in the context of a Rule 12 motion, the Court “may, however, look to the insurance contract to apply the facts, as alleged by plaintiff, to the contract.”)

The State does not dispute the existence of the Contract. Moreover, the Contract is central to the State’s claims and is referred to throughout the Complaint: indeed, the State’s entire cause of action is premised on the Contract. This is not only reflected in the State’s pleading associated with its Breach of Contract Count XV, but upon review of its Negligence Count XVI, as well. The State’s Negligence Count XVI is nearly identical to the JV’s purported breaches of its duty of care and alleged breach of Contract in Count XV. Accordingly, the Contract is central to the claims and may be properly considered by this Court. *EDC Inv., LLC*, 275 A.3d at 543 (ruling that documents which are “central to the plaintiffs’ claim” may be appropriately considered for the purposes of ruling on a Rule 12(b)(6) motion).

III. THE STATE’S OWN ADMISSIONS DEFEAT THE STATE’S CLAIMS.

While the State conveniently attempts to rewrite history in its Complaint to place blame on the JV for not uncovering hidden infirmities of the then-existing Washington Bridge, the State admits that it was only the post-closure investigation of the Washington Bridge that revealed the Washington Bridge could not be rehabilitated and needed to be demolished. **“Later investigation revealed the existence of numerous significant problems with the structural integrity of the [Washington] Bridge, the severity of which have made the [Washington] Bridge unsalvageable.”** (Pl. Obj. at 2) (emphasis added).

The timing of the discovery of the significant structural problems with the Washington Bridge is critical and defeats the breach-of-contract claims against the JV. Whether the defenses of impossibility, failure of consideration or mutual mistake apply is academic because the State has admitted that no one knew of the structural infirmities of the bridge prior to its closure in

December 2023. These admissions are ““judicially admitted fact[s]”” and are ““conclusively established.”” *DiLuglio v. Providence Auto Body, Inc.*, 755 A.2d 757, 767 (R.I. 2000) (quoting *Martin v. Lilly*, 505 A.2d 1156, 1161 (R.I. 1986)). With that admission, the contract claim against the JV for purportedly failing to see problems *the State itself did not find until after the closure* must fail. The State simultaneously (1) admits the Project was unfeasible **and** (2) alleges the JV breached the Contract for not completing the Project in accordance with the Contract. Logically, both assertions cannot be true. The State’s judicial admission and conclusive establishment that the Project was not feasible defeats the State’s hollow, unsupported legal conclusion that the JV purportedly breached the Contract. Further, there is not a single requirement in the RFP for the JV to perform any investigation to determine whether the Washington Bridge was structurally sufficient; that determination had already been made by the State preceding the issuance of the rehabilitation RFP.

Moreover, as to the Contract, the State admits to providing the JV a deficient BTC on which the State based its procurement of the Project. (Compl. ¶¶ 76-77; Count IV ¶¶ 111-14). The Contract is clear: the BTC “***defines the scope of the Project.***” Motion Ex. 2, RFP, Part 3 – Terms and Conditions, Appendix C (Abbreviations, Definitions And Terms). The State does not dispute that the BTC failed to address any of the structural issues that led to the State’s determination to remove and replace the Washington Bridge. The State does not allege, nor can it, that the JV failed to comply with the BTC. The only argument advanced in the State’s Objection is that the JV failed to provide a Washington Bridge design that achieved a 25-year design life. By the State’s own admissions, once the true condition of the bridge was discovered through expensive post-closure testing, it was impossible to achieve a 25-year design life through a rehabilitation of the Washington Bridge. If rehabilitation in compliance with the BTC was possible, in contrast with

demolition and reconstruction, the State would have proceeded with the rehabilitation instead of terminating the Contract for convenience. The State’s decision to terminate for convenience is an admission that compliance with the BTC was impossible to achieve a 25-year design life. The JV is not responsible for the State’s deficient BTC, both by the State’s own admission, and pursuant to long-standing legal precedent.

Under the *Spearin* Doctrine, the State impliedly warranted that if the JV met the BTC, as it was required to do, a satisfactory Project would result. *Fanning & Doorley Const. Co. v. Geigy Chem. Corp.*, 305 F. Supp. 650, 672 (D.R.I. 1969) (“[T]he court is strongly persuaded by a decision of the United States Supreme Court [*Spearin*]² in extremely analogous circumstances.”); *see generally United States v. Spearin*, 248 U.S. 132 (1918). The Court in *Fanning & Doorley Const. Co.* examines *Spearin*, explaining that, “[t]he Court [in *Spearin*] concluded that a contractor who is obliged to build according to plans and specifications prepared by the owner is not responsible for the consequences of defects in those plans and specifications.” *Fanning*, 305 F. Supp. at 672–73. *Spearin*, as applied here, clarifies that the State impliedly warranted that the BTC, if followed, would yield a successful rehabilitation Project. *See Spearin*, 248 U.S. at 137; Motion Ex. 3, RFP, Part 1 – Instructions to Proposers (3.1 General Description of Base Technical Concept) (“The documents submitted by a Proposer shall be based on the BTC.”); *id.* (“Following award of the Contract, the BTC . . . will become [the] Contractual obligation[] of the Proposer if it should obtain the Contract.”).

² 3 Bruner & O'Connor Construction Law § 9:91 (Implied warranty of design adequacy: *Spearin* doctrine) (noting that, “[t]he origin of the implied warranty of design adequacy was the landmark case of *United States v. Spearin*, now followed in virtually every American jurisdiction.”).

IV. BREACH OF CONTRACT COUNT XV IS NOT CONSISTENT WITH OR SUPPORTED BY THE CONTRACT TERMS, WHICH IS FATAL TO THE CLAIM.

The most important component of a breach of contract claim is the agreement itself; what are the terms and conditions of the contract? The contract terms form the basis of the agreement between the parties and the baseline for whether a breach has occurred. Yet, paragraph 165 of Count XV of the Complaint sets forth broad generalizations which are found nowhere in the Contract. In short, the JV is being sued for work that is not in the Contract. If the JV was never required to perform any of the listed tasks in paragraph 165, how could it have breached the contract? Paragraph 165 provides as follows:

- (a) conduct a detailed research and review of the bridge file for the Washington Bridge in conformance with the 2021 Design-Build Contract;
- (b) conduct an inspection of the Washington Bridge in conformance with the 2021 Design-Build Contract;
- (c) perform evaluations and report to the State as required by the 2021 Design-Build Contract;
- (d) recommend needed repairs in accordance with the 2021 Design-Build Contract; and
- (e) otherwise comply with its contractual obligations.

Compl. ¶ 165³.

The JV challenged the State to identify the Contract terms that support Paragraph 165's allegations by filing its Motion. The State cannot do so because those requirements do not appear anywhere in the Contract. The State does not identify the Contract provisions in its Objection and therefore the Breach of Contract Count XV should be dismissed. In the alternative, paragraph 165

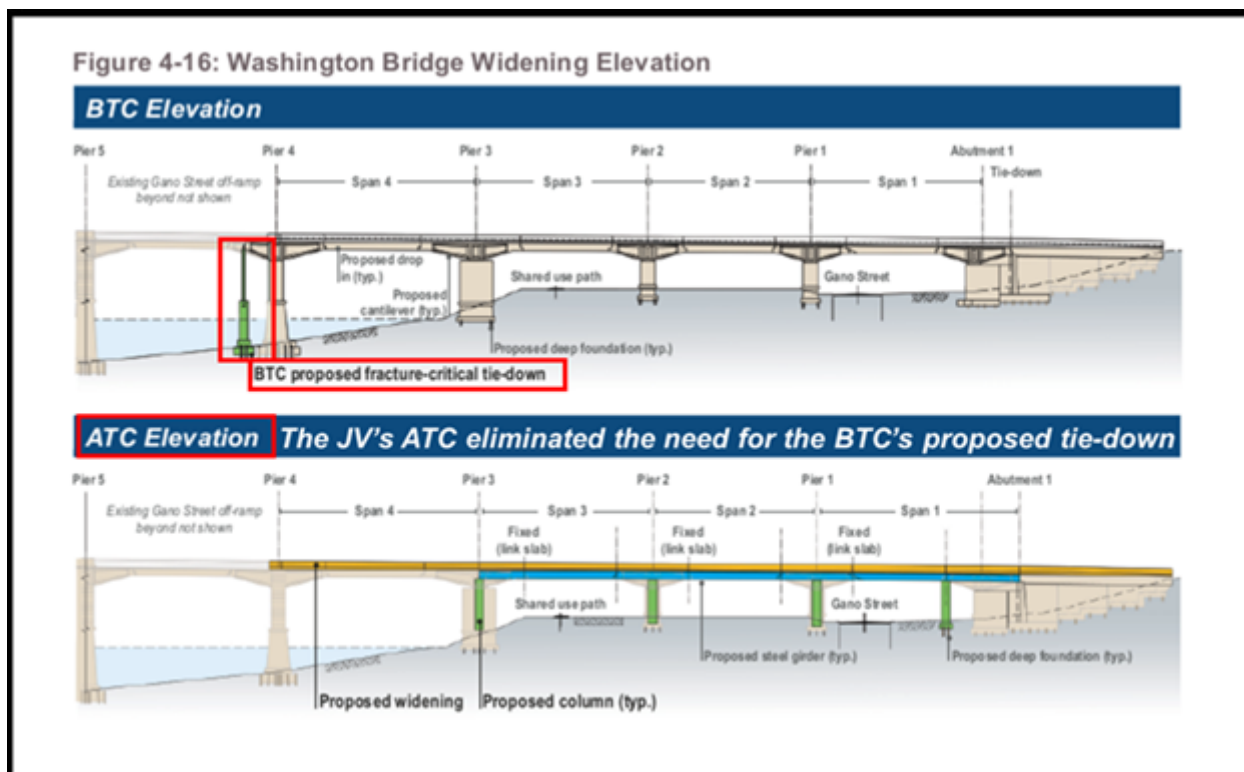
³ Confusingly, the State copy-pastes the same obligations regarding AECOM's purported breaches (Compl. ¶ 143), as though the JV shared the same obligations as AECOM.

should be stricken under Rule 12 as immaterial, impertinent, or scandalous matter. *See* Super. R. Civ. P. 12(f).

Rather than cite to the terms of the Contract that support those allegations, the State's Objection redirects the Court back to the State's conclusory and vague allegations asserted in the State's Complaint.

V. REHABILITATION OF THE TIE-DOWNS AT PIERS 6 AND 7 WERE NOT INCLUDED IN THE BTC AND WERE NOT IN THE SCOPE OF WORK OF THE PROJECT AS DEFINED SOLELY BY THE STATE.

In its Objection, the State claims that because the JV addressed the tie-down at Pier 4, the JV was also responsible for the tie-downs at Piers 6 and 7. (Pl. Obj. at 12-13.); (Compl. ¶ 87). A plain reading of the Contract negates the State's argument. The BTC identified an issue at Pier 4 that required the incorporation of a retrofit element, a "tie-down", as part of the BTC's proposed rehabilitation. Motion Ex. 4A, Technical Proposal, Binder 1 (ATC Summaries at 16). Instead of incorporating the new tie-down, the JV proposed an Alternate Technical Concept ("ATC") to address the issue flagged by the State in its BTC in a different way. *Id.* The elevations included in the JV's RFP response clearly show the elimination of the tie-down at Pier 4 in its ATC that was accepted by the State:



Motion Ex. 4A, Technical Proposal, Binder 1 (4.2 Bridge, Retaining Walls, and Other Structures, Summaries at 23). Key to this process was the BTC’s threshold determination of an issue at Pier 4. The State cannot point to the BTC for the proposition that the BTC identified any structural deficiencies requiring the JV to address tie-down rods at Piers 6 and 7. Yet, the State seemingly rests its case on the JV’s purported failure to identify structurally deficient tie-downs at Piers 6 and 7. The State’s allegations are contradicted by the contractually required BTC. This alone is fatal to the State’s claim.

VI. THE ECONOMIC LOSS RULE APPLIES TO THE STATE.

The State fails to provide any authority for the notion that the economic loss rule does not apply to the State in its role as a sophisticated contracting entity. The State claims that the “policies underpinning the application of the economic loss doctrine in commercial transactions are simply not present in this case” and proceeds to cite two inapposite, *out-of-jurisdiction cases* while

ignoring applicable Rhode Island precedent. (Pl. Obj. at 34). Contrary to the State’s characterization of these holdings, neither case stands for the proposition that public entities are immune from the economic loss doctrine.

The State is a sophisticated contracting entity that created the Contract which it offered to equally sophisticated prospective bidders as the basis of the bargain. From a policy standpoint, there is no difference between sophisticated commercial contracting parties and sophisticated public works contracting parties. Indeed, the State had complete control over the drafting of the contract and could have carved out economic loss to make it clear to the bidders that such exposure should be considered when pricing the project. Under well-established Rhode Island law, the economic loss doctrine applies, and the negligence Count fails as a matter of law. *Bos. Inv. Prop. No. 1 State v. E.W. Burman, Inc.*, 658 A.2d 515, 517 (R.I. 1995); *Franklin Grove Corp. v. Drexel*, 936 A.2d 1272, 1275–77 (R.I. 2007).

The State further contends the economic loss rule is inapplicable to the underlying action because the State sufficiently pled “property damage.” The State cites to its Complaint’s conclusory language alleging “physical damage to its property” without any actual facts to put the JV on notice as to what damage was caused. (Pl. Obj. at 35). The State’s claim of physical property damage is so all-encompassing as to fail to comport with the requirements of due process. *See N. Farm Home Owners Ass'n, Inc. v. Bristol Cnty. Water Auth.*, 315 A.3d 933, 946 (R.I. 2024); *see also Hyatt v. Village House Convalescent Home, Inc.*, 880 A.2d 821, 824 (R.I. 2005) (noting that Rhode Island law recognizes a liberal pleading standard but underscoring “[t]hat is not to say, however, that the drafter of a complaint has no responsibilities with respect to providing some degree of clarity as to what is alleged; due process considerations are implicated”) (internal quotations and citations omitted).

The Rhode Island Supreme Court has noted that to comply with Rule 8(a), “a pleading need not include ‘the ultimate facts that must be proven in order to succeed on the complaint or to set out the precise legal theory upon which his or her claim is based.’” *N. Farm Home Owners Ass’n, Inc.*, 315 A.3d at 945 (quoting *Gardner v. Baird*, 871 A.2d 949, 953 (R.I. 2005)). Yet the Rhode Island Supreme Court has also recognized that “the drafter of a complaint has... responsibilities with respect to providing some degree of clarity as to what is alleged; due process considerations are implicated, and we require that ‘the complaint give the opposing party fair and adequate notice of the type of claim being asserted.’” *Barnes v. R.I. Public Trans. Auth.*, 242 A.3d 32, 37 (R.I. 2020) (quoting *Hyatt*, 880 A.2d at 824).

Here, the State undoubtedly owns a multitude of buildings, parks, monuments, and infrastructure, and therefore, it is unclear what damages the State is claiming by way of the “physical damage to its property” it alleges.⁴ While the State offers conjecture of facts that are “not inconceivable,” that hardly meets the pleading standard to give the JV fair notice of the damage suffered. The State’s allegation is a bare legal conclusion that is contrary to the State of Rhode Island’s pleading requirements. *See N. Farm Home Owners Ass’n, Inc.*, 315 A.3d at 946.

VII. TAXPAYERS WILL BEAR THE BURDEN IF THIS COURT EXEMPTS THE STATE FROM THE ECONOMIC LOSS RULE.

Exempting the State from the economic loss rule would have grave consequences for public works construction in Rhode Island and would adversely affect its taxpayers. No State recognizes this exception. Contractors evaluate the risks inherent in a project when bidding. Sureties and insurance companies also evaluate risk in setting premiums to support public works construction. When the risks associated with a project are set forth in the contract documents, the risks can be

⁴ Damage to other avenues of travel and risk of damage resulting from demolition of the Washington Bridge are both consequential damages, and their risk could have been allocated in the Contract between the State and the JV.

assessed and priced. Extending a contractor's exposure beyond the contract to tort liability, without personal injury or property damage, would lead to higher prices to cover the contingencies of unknown risk and fewer interested bidders in a project. The Rhode Island Supreme Court recognized the danger and aptly quoted the Supreme Court of Washington:

The Supreme Court of Washington stated that if tort and contract remedies were allowed to overlap, particularly in the construction industry, "certainty and predictability in allocating risk would decrease and impede future business activity."

E.W. Burman, Inc., 658 A.2d at 517 (quoting *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist.*, 881 P.2d 986, 992 (Wash. 1994)).

The Rhode Island Supreme Court, quoting the Supreme Court of New Jersey, further provided:

Generally speaking, tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident. *Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.*

E.W. Burman, Inc., 658 A.2d at 518 (citing *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 489 A.2d 660, 672 (N.J. 1985)) (emphasis in the original). In sum, exempting the State from the economic loss rule would not be without consequence to all future construction projects in which bidder interest would be limited and prices would be higher than if the contract controlled and defined the inherent risks.

VIII. THE STATE'S ALLEGATIONS FAIL TO SUPPORT A CLAIM FOR NEGLIGENT MISREPRESENTATION.

The State cites one unpublished, factually and principally unrelated case for the proposition that its negligent misrepresentation claim is well-pled. Nevertheless, the State fails to plead any of

the required elements. The elements of negligent misrepresentation are: “(1) a misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the misrepresentation without knowledge as to its truth or falsity or must make the representation under circumstances in which he [or she] ought to have known of its falsity; (3) the representor must intend the representation to induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation.” *Rhode Island Econ. Dev. Corp. v. Wells Fargo Secs.*, No. PB-12-5616, 2013 WL 4711306, at *36 (R.I. Super. Aug. 28, 2013).

The only representations made by the JV, which the State relies on as a basis for its negligent misrepresentation action, are the JV’s “statements” set forth in its RFP response. These JV “statements” were not separate from the contract or transaction, but part of the offer the State accepted to form the contract. The RFP response was not a separate representation, it was part and parcel of the agreement. It cannot form the basis of a separate tort. Accordingly, the Court must reject the State’s proposition that it sufficiently pled a negligent misrepresentation claim. *See N. Farm Home Owners Ass’n, Inc.*, 315 A.3d at 946.

IX. CONCLUSION

The State’s endeavor to hold the JV “accountable” is misplaced and not supported by the facts or the law. Rather than address the narrow issues before the Court on the JV’s Motion—the specific terms of the RFP and Contract—the State attempts to justify its pleading by redirecting the Court back to the State’s conclusory and vague allegations asserted in the State’s Complaint, which are not founded on the RFP or the Contract.

The State also urges this Court, without any basis, to exempt the State from the economic loss doctrine. Not only is the State’s position not supported by Rhode Island law, but such an

exemption would have severe consequences (retroactive and prospective) for public works construction in Rhode Island and would adversely affect the taxpayers.

For the reasons set forth throughout, the JV respectfully requests that the Court dismiss the JV and its members from the State's action in its entirety.

Dated: January 14, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on Tuesday, January 14, 2025, I filed and served *Barletta/Aetna I-195 Washington Bridge North Phase 2 JV's Reply to the State of Rhode Island's Response in Opposition to JV's Rule 12 Motion* through the electronic filing system on all counsel of record.

The document electronically filed and served is available for viewing and/or downloading from the Rhode Island Judiciary's Electronic Filing System.

/s/ Jeffery B. Pine

Jeffrey B. Pine