STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

FILED: MARCH 2, 2012

SHIRE CORPORATION, INC.,	:	
	:	
v.	:	**C.A. No. PB 09-5686**
	:	
THE RHODE ISLAND DEPARTMENT OF TRANPORTATION; MICHAEL LEWIS, in his capacity as Director of Transportation; GARY SASSE, in his capacity as Director of Administration; JEROME WILLIAMS, Individually; KAZEM FARHOUMAND, Individually, and in his capacity as Chief Engineer of the Rhode Island Department of Transportation; FRANK CORRAO, III, Individually, and in his capacity as Chief of Construction Management for the Rhode Island Department of Transportation; CHRISTOS XENOPHONTOS, Individually, and in his capacity as Chief of Contracts and Specifications for the Rhode Island Department of Transportation; LISA MARTINELLI, in her capacity as Executive Legal Counsel for the Rhode Island Department of Transportation; RICHARD FONDI, Individually, and in his capacity as Chief of Final Acceptance for the Rhode Island Department of Transportation; MICHAEL SWIFT, in his capacity as Principal Civil Engineer for the Rhode Island Department of Transportation; and, JAMES R. CAPALDI, Individually	:	

DECISION

SILVERSTEIN, J. Before this Court is Defendants' (Defendants or State, collectively) Motion for Summary Judgment on all counts of Plaintiff Shire Corporation, Inc.'s (Plaintiff or Shire) Second Amended Complaint (Complaint or 2d Am. Compl.) pursuant to Super. R. Civ. P. 56, as well as Defendants' Motion for Summary Judgment on Counts III (Abuse of Process) and VI

(Civil Conspiracy) based on the Rhode Island Limits on Strategic Litigation Against Public Participation law (Anti-Slapp statute), codified at G.L. 1956 § 9-33-1 et seq. In addition to their arguments on the Anti-Slapp statute and their arguments with respect to each count, Defendants also argue that this Court should dismiss all counts for failure to exhaust administrative remedies and that this Court should dismiss Counts I (Art. I, § 2 of Rhode Island Constitution), IV (Tortious Interference with Contractual Relations), and V (Tortious Interference with Prospective Business Relations) for violating the statute of limitations set forth in G.L. 1956 §§ 9-1-14(b) and 9-1-25.

I

Facts and Travel

Shire's extensive claims, encompassing events spanning the last decade, relate to a myriad of assertions, agreements, actions, and accusations involving Shire and departments and employees of the State of Rhode Island. A synopsis of this saga, as established by the pleadings, affidavits, and other materials submitted in connection with this Motion, is set forth below.

Shire is a family-owned and -operated highway and bridge contractor that has been in business since 1995.[1] Shire's business consists of highway, bridge, and other construction projects administered by the Rhode Island Department of Transportation (RIDOT) through contracts with the Rhode Island Department of Administration (RIDOA). RIDOA is the chief agency of the executive branch, and it is headed by the Director of Administration, who is the Chief Purchasing Officer for the State of Rhode Island. The Chief Purchasing Officer also appoints a Purchasing Agent for the State. RIDOA, among other things, is the signatory for all State public works project contracts.

[1] Shire was first owned by Clark Donatelli, then Clark Donatelli, Jr. and Peter Donatelli, and since 2007 has been owned by Laura (Donatelli) Gammino and her husband, Thomas Gammino.

RIDOT is the agency of the executive branch responsible for the maintenance and construction of highways, bridges, roads, and the like in the State of Rhode Island. It engages in public works projects funded through both State revenue sources and federal assistance, including funds from the Federal Highway Administration (FHWA). Typically, FHWA provides approximately eighty percent (80%) of the funding for federal-oversight transportation projects on which it concurs, with the State supplying the remaining twenty percent (20%). An agency of the United States Department of Transportation, FHWA has a division office with a Division Administrator in each state.

Transportation-related public works contracts are advertised by RIDOA, but designs, plans, and specifications are prepared by engineering contractors of RIDOT. The contracts are subject to competitive bidding under the relevant state law. Once the contract is awarded and construction commences, the project is overseen by RIDOT and its engineers. If issues arise that require material changes to the construction contract, Reports of Change and Contract Addenda (often referred to as change orders) may issue.

Shire has bid on and won numerous transportation-related public works contracts that form the foundation of its allegations. These projects include Greenwood Avenue,[2] Point Street,[3] Barrington Bridge,[4] and what will be termed the first I-95 project.[5] Shire made a claim for bid costs on the first I-95 contract after it was cancelled by RIDOA. With the Greenwood Avenue, I-295, Point Street, and Barrington Bridge projects, engineering design and construction issues arose, leading Shire to submit change orders and claims and to file civil actions.

[2] Contract # 2001-CB-014, Replacement of Greenwood Avenue Railroad Bridge # 2
[3] Contract # 2002-CH-069, Improvements to I-295 (I-295); Contract # 2002-CB-023, Replacement of Point Street Overpass
[4] Contract # 2003-CB-045, Replacement of Barrington Bridge
[5] Contract # 2004-CB-008, Improvements to I-95 Riding Surface and Ramps

On January 31, 2005, the parties entered into the Point Street Settlement Agreement, affording a $3,100,000 payment from the State to Shire and including an agreement to arbitrate future claims on then-pending projects, such as Barrington Bridge and Greenwood Avenue. The Point Street Settlement Agreement also created a Trust Account for all payments thereafter from the State to Shire on all of the listed pending projects, with disbursements from the account made by a consultant who would monitor Shire's daily work and report Shire's progress to the State at regular intervals.

In January 2005, bids were opened on two contracts, a second I-95 project[6] and Rawson Road,[7] on which Shire claims it was the low-bidder but was directed to withdraw its bids by RIDOA. Shire claims that RIDOA instructed it to withdraw these bids to facilitate resolution of issues on existing projects and that RIDOA implied there would be adverse economic consequences to Shire if it did not comply. Shire withdrew the bids, and the contracts were instead awarded to Aetna Bridge Corporation, a close competitor of Shire. There were also issues with RIDOT attempting to withhold award of the I-95 Ramps[8] project, on which Shire was the low-bidder, until Shire settled claims on the Barrington Bridge.

Shire alleges particular issues surrounding a Union Avenue[9] contract, on which it claims it was notified it was the low-bidder on June 23, 2005 and was promised the award by RIDOA officials. In November 2005, the Warren Bridge[10] contract opened for bidding, and Shire claims it was directed by RIDOA officials not to submit a bid in order to alleviate political concerns surrounding the Barrington Bridge and Point Street issues and to ensure Shire would receive the

[6] Contract # 2005-CB-012, Safety Improvements to I-95 Riding Surface, Bridges and Ramps
[7] Contract # 2004-CB-034, Replacement of Rawson Road Bridges # 457 & 460
[8] Contract # 2005-CB-026, Safety Improvements to I-95 Riding Surface, Bridges and Ramps
[9] Contract # 2005-CB-056, Replacement of Union Avenue Bridge
[10] Contract # 2005-CB-057, Replacement of Warren Bridge # 124

Union Avenue award. There was a meeting between RIDOA, RIDOT, and FHWA officials in mid-October, 2005, during which an agreement may have been reached to award Union Avenue but not to award Warren Bridge to Shire, even if it were the lowest responsible bidder. Shire did not immediately receive the Union Avenue contract, perhaps due to funding issues or delay on another project, but Shire remained in contact with RIDOA and continued to receive assurances it would be awarded the contract. Shire was allegedly assured the contract was being held open repeatedly until May 2008, when Shire learned it may not receive Union Avenue.

Previously, on September 29, 2006, the parties entered into the Barrington Bridge Settlement Agreement, as a result of which the State paid Shire $5,300,000. The settlement also established an Oversight Committee consisting of representatives of Shire, its Surety, RIDOA, RIDOT, and FHWA to meet monthly to review and discuss progress, change orders, and payments between the State and Shire with regard to the Barrington Bridge project. Shire believes that the Barrington Bridge Settlement upset some RIDOT personnel. Immediately following the settlement, the State sought liquidated damages from Shire on the Greenwood Avenue project. Shire further alleges the State, for some period of time, withheld retainage and payments in excess of $1,000,000 each and slowed approval of Shire's change orders.[11]

Meanwhile, in April 2008, RIDOT became suspicious that one of Shire's employees may have been illegally accessing portions of the RIDOT Project Management Portal (PMP), a computer system used to track ongoing construction projects. After an initial, internal investigation, RIDOT passed its suspicions along to the Rhode Island State Police, who, after conducting its own investigation, obtained a warrant, searched Shire's office, and arrested the employee on June 4, 2008. Shire claims that the information accessed was public information

[11] According to Thomas Gammino, "a lot" of the amount withheld has since been released to Shire by the State. (Thomas Gammino Dep. 156:21-24, Aug. 3, 2010.)

and led to no competitive advantage, although it admitted responsibility for the alleged misconduct in an Administrative Settlement and Compliance Agreement. Throughout, RIDOT was in contact with FHWA regarding a potential suspension of Shire from the bidding process, particularly because Shire was the low-bidder on new projects—the East Bay Bikepath[12] and the Conanicus Seawall.[13] On September 3, 2008, FHWA suspended Shire, and RIDOA suspended Shire based on the federal suspension on September 15, 2008.

The criminal charges against the Shire employee were initially dismissed on December 1, 2008. The employee was arraigned again in January 2009, and those charges dismissed pursuant to Super. Ct. R. Crim. P. 48A in January 2011. The federal suspension of Shire was lifted when the Administrative Settlement and Compliance Agreement was reached on April 24, 2009. The state lifted its suspension April 30, 2009. Since that time, disputes between Shire and the State have continued, leading to arbitration, settlement, or litigation of Barrington Bridge, Greenwood Avenue, and I-295 claims, as well as new issues on the Child Street[14] and Interim Bridge Repairs[15] contracts.

On September 30, 2009, Shire filed the original Complaint in the matter at bar after the State advertised a new Union Avenue contract[16] for bidding, almost identical to the prior Union Avenue contract. Shire's Second Amended Complaint, filed February 1, 2010, sets forth ten counts: (1) violation of Article I, Section 2 of the Rhode Island Constitution, (2) RICO violations, (3) abuse of process, (4) tortious interference with contractual relations, (5) tortious interference with business relations, (6) civil conspiracy, (7) equitable estoppel, (8) breach of

[12] Contract # 2008-CH-028, Repairs to East Bay Bikepath
[13] Contract # 2008-CM-066, Repairs to Conanicus Seawall
[14] Contract # 2009-CH-066, ADA Improvements to Child Street
[15] Contract # 2009-CB-100, Interim Repairs to Bridge # 550
[16] Contract # 2009-CB-063, Replacement of Union Avenue Bridge No. 452

contract, (9) declaratory judgment, and (10) injunctive relief. The State initially moved for summary judgment on December 16, 2010, although a number of hearings, a significant amount of discovery, and the submission of many memoranda have succeeded that date.

II

Standard of Review

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

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

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

III

Discussion

Prior to addressing the State's summary judgment arguments on the Anti-Slapp statute and on each count of the Complaint, this Court must examine the State's contentions that (1) all of Shire's claims are barred by its failure to exhaust administrative remedies under the Purchasing Act, and (2) some of Shire's claims are barred by the applicable statutes of limitations. Accordingly, this Court will discuss those two arguments, in order, before beginning any further analysis of the individual summary judgment claims.

A

Exhaustion of Administrative Remedies and Purchasing Act

The State, within its Memorandum of Law in Support of its Motion for Summary Judgment (Defs.' 12/16/10 Mem.), requests this Court dismiss all of Shire's claims because of Shire's alleged failure to exhaust administrative remedies provided by the Rhode Island Purchasing Act (Purchasing Act), codified at G.L. 1956 § 37-2-1 et seq. Shire, on the other hand, contends there are no mandatory administrative remedies it must exhaust under the Purchasing Act, and in any event, it submitted bid protests pursuant to the Act.

It has often been said that "[a]s a general rule, a plaintiff must first exhaust his [or her] administrative remedies before seeking judicial review of an administrative decision." Downey v. Carcieri, 996 A.2d 1144, 1150 (R.I. 2010) (citations omitted). This general principle has developed because exhaustion of administrative remedies "(1) aids judicial review by allowing the parties and the agency to develop the facts of the case, and (2) it promotes judicial economy

by avoiding needless repetition of administrative and judicial factfinding, perhaps avoiding the necessity of any judicial involvement." Id. (quoting Doe ex rel. His Parents and Natural Guardians v. East Greenwich Sch. Dep't, 899 A.2d 1258, 1266 (2006)). There is typically a "strong preference for proceeding with an administrative procedure through review as opposed to instituting a separate action . . . ." Richardson v. R.I. Dep't of Educ., 947 A.2d 253, 259 (R.I. 2008) (quoting Mall at Coventry Joint Venture v. McLeod, 721 A.2d 865, 870 (R.I. 1998)). However, exhaustion of administrative remedies is not required when pursuing them would be futile or inadequate, would result in irreparable harm, or is prevented by the administrative agency. See Doe, 899 A.2d at 1266; see also Burns v. Sundlum, 617 A.2d 114, 117 (R.I. 1992) (holding exhaustion of administrative remedies not applicable where futile and not in furtherance of purposes of administrative remedies); R.I. Chamber of Commerce v. Hackett, 122 R.I. 686, 688, 411 A.2d 300, 302 (1980) (holding exhaustion of administrative remedies not applicable where would not provide adequate remedy).

Further, exhaustion of administrative remedies is not required when "in contravention of the plain language and manifest intent of a statute." Downey, 996 A.2d at 1151; see Ward v. City of Pawtucket Police Dep't, 639 A.2d 1379, 1382-83 (R.I. 1994) (determining error in requiring exhaustion of administrative remedies when no statutory language in Civil Rights Act requiring or even suggesting plaintiff must first exhaust administrative remedies). "It is well established that 'when the language of a statute is clear and unambiguous, [the Court] must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." Downey, 996 A.2d at 1150 (quoting Liberty Mut. Ins. Co. v. Kaya, 947 A.2d 869, 872 (R.I. 2008)). Generally, statutory construction is "accomplished by 'an examination of the

language, nature, and object of the statute.'" Id. (quoting Berthiaume v. Sch. Comm. of Woonsocket, 121 R.I. 243, 247, 397 A.2d 889, 892 (1979)).

The Purchasing Act provides the statutory framework for the competitive bidding process in Rhode Island. Within the Act, it provides for the authority to determine and resolve bid protests as follows:

> "(a) The chief purchasing officer or his or her designee shall have the authority to determine protests and other controversies of actual or prospective bidders or offerors in connection with the solicitation or selection for award of a contract.
> (b) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the purchasing officer. A protest or notice of other controversy must be filed promptly and in any event within two (2) calendar weeks after the aggrieved person knows or should have known of the facts giving rise thereto. All protests or notices of other controversies must be in writing.
> (c) The chief purchasing officer shall promptly issue a decision in writing. A copy of that decision shall be mailed or otherwise furnished to the aggrieved party and shall state the reasons for the action taken." Sec. 37-2-52 (emphasis added).

The statute, by its plain language, states that an aggrieved actual or prospective bidder may file a bid protest. Id. Examining the object of the statute, the primary goals of the Purchasing Act are "(1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts." Associated Builders & Contractors of R.I., Inc. v. Dep't of Admin., 787 A.2d 1179, 1187 (R.I. 2002) (relying on purposes of similar New York and Massachusetts competitive bidding statutes) (quoting N.Y. State Chapter, Inc. v. N.Y. State Thruway Auth'y, 666 N.E.2d 185, 190 (1996)); see § 37-2-2(b) (listing eight underlying purposes of Rhode Island Purchasing Act).

The Purchasing Act itself explains, "'May' means permissive." Sec. 37-2-7(12). And, Rhode Island courts have consistently adopted the same meaning of the word. See Downey, 996 A.2d at 1151 ("axiomatic principle of statutory construction that the use of the term 'may' denotes a permissive, rather than an imperative, condition"); Quality Court Condo. Ass'n v. Quality Hill Dev. Corp., 641 A.2d 746, 751 (R.I. 1994) ("use of the word 'may' rather than the word 'shall' indicates a discretionary rather than a mandatory provision"); Carlson v. McLyman, 77 R.I. 177, 182, 74 A.2d 853, 855 (R.I. 1950) ("the ordinary meaning of the word 'may' is permissive and not compulsive"). The Purchasing Act defines "may" as "permissive," and "[a]s a rule, a definition which declares what a term means is binding upon the court." 2A Norman J. Singer, Sutherland Statutory Construction § 47:7 (7th ed.).

Furthermore, "[p]rior to the institution of arbitration or litigation concerning any contract, claim, or controversy, the chief purchasing officer is authorized . . . to settle, compromise, pay, or otherwise adjust the claim . . . ." Sec. 37-2-46. Notably, the statute does not provide that the purchasing officer is required to resolve or determine claims or controversies before litigation. See id. (granting authority without mandating it be exercised). Lawsuits challenging government procurement awards pursuant to the Purchasing Act may be brought without the types of procedural limitations imposed by the Administrative Procedures Act (APA). See Brian P. Stern, Sour Grapes: Unrestrained Bid Protest Litigation in Rhode Island—Blue Cross & Blue Shield of Rhode Island v. Najarian, 10 Roger Williams U. L. Rev. 685, 686 (Spring 2005) (hereinafter Stern, Sour Grapes). Considering the standing of a contractor who did not bid on a project, this State's highest court found that the contractor had standing without first making any finding that contractor exhausted administrative remedies or filed a bid protest pursuant to § 37-2-52, which applies to prospective bidders. See Associated Builders, 787 A.2d at 1181-86 (R.I.

2002) (discussing standing of prospective bidder to challenge the requirement of project labor agreements in public construction contract). Section 37-2-52, providing that a party may file a bid protest, does not set procedural limitations.

In a recent, analogous case, the Downey court considered whether plaintiffs are required to exhaust administrative remedies under the Access to Public Records Act (APRA), G.L. 1956 § 38-2-1 et seq., prior to initiating suit in the Superior Court regarding information requested from RIDOA. 996 A.2d at 1145-47. The lower court had determined that § 38-2-8 of the APRA permitted a party to pursue administrative remedies, but did not require they be pursued. Id. at 1147. Like the Purchasing Act, the comparable APRA statute provided that an aggrieved person "may petition the chief administrative officer" and then that the "chief administrative officer shall make a final determination."[17] Sec. 38-2-8. On review, the Supreme Court in Downey ruled it was "clear that the section sets forth various administrative remedies without requiring that they be pursued prior to bringing an action in the Superior Court." 996 A.2d at 1151. The

[17] The APRA statute provides, in pertinent part:

> "(a) Any person or entity denied the right to inspect a record of a public body by the custodian of the record may petition the chief administrative officer of that public body for a review of the determinations made by his or her subordinate. The chief administrative officer shall make a final determination whether or not to allow public inspection within ten (10) business days after the submission of the review petition.
> (b) If the chief administrative officer determines that the record is not subject to public inspection, the person or entity seeking disclosure may file a complaint with the attorney general. The attorney general shall investigate the complaint and if the attorney general shall determine that the allegations of the complaint are meritorious, he or she may institute proceedings for injunctive or declaratory relief on behalf of the complainant in the superior court of the county where the record is maintained. Nothing within this section shall prohibit any individual or entity from retaining private counsel for the purpose of instituting proceedings for injunctive or declaratory relief in the superior court of the county where the record is maintained." Sec. 38-2-8.

Court relied on the use of the word "may,"—despite the subsequent use of "shall"—and the principles of statutory construction in reaching its determination. See id. (referencing "axiomatic principle" that "may" is permissive).

It is apparent to this Court that, like in Downey, the bid protest statute in the Purchasing Act permits but does not require a plaintiff to take advantage of administrative remedies prior to initiating suit in the Superior Court. Evidently absent from the statute and the surrounding sections are any requirements of exhausting administrative remedies prior to litigation. See § 37-2-52; cf. § 42-35-15 (providing under APA that party entitled to judicial review only if "exhausted all administrative remedies"). Importantly, the Purchasing Act only states that a party may file a protest with the Chief Purchasing Officer. Sec. 37-2-52. In accordance with the definition of "may" in the Purchasing Act and the Rhode Island cases interpreting the word, this Court adopts a permissive reading of the administrative remedies set forth in the Purchasing Act. See § 37-2-7(12) (defining "may" as "permissive"); Downey, 996 A.2d at 1151 (stating "may" denotes permissive, not imperative, action).

Moreover, while it may be disputed whether Shire fully exhausted all administrative remedies in a timely manner, Shire did put Defendants on notice of its claims. Cf. G.L. 1956 §37-13.1-1 (permitting Superior Court claim for disputes arising from already-awarded public works contracts provided general notice given in writing). On May 19, 2008, Shire sent a demand letter to Brian Stern (former Purchasing Agent but then Chief of Staff to the Governor) allegedly with a copy to the director of RIDOA and the Chief Purchasing Officer, demanding anticipated profits on the Union Avenue contract. 2d Am. Compl. ¶ 134, Ex. H (Demand Ltr. from Shire to Stern, May 19, 2008); Donatelli Aff. ¶ 31, Dec. 16, 2009; Pl.'s Obj. to Defs.' Mot. for Summ. J. (Pl.'s 6/10/11 Obj.) 31. Shire learned just three days earlier that it may not be

awarded the Union Avenue contract, despite prior assurances from RIDOA. (2d Am. Compl. ¶ 133-34; T. Gammino Dep. 99:10-15, Aug. 3, 2010.) Before then, Shire believed they were the low bidder and would eventually receive the contract. (Thomas Gammino Aff. ¶¶ 7-8, Jun. 10, 2011.) This Court is persuaded that Shire felt no need to file a bid protest when it was the low bidder assured it would receive the Union Avenue contract. When a new Union Avenue contract was advertised September 29, 2009, Shire sent a letter noticing the controversy to the legal counsel for RIDOA. (2d Am. Compl. ¶¶ 184-188, Ex. I (Ltr. from Shire to RIDOA, Oct. 2, 2009)). Defendants strenuously contest the effectiveness and appropriateness of these letters as bid protests under the Purchasing Act, but there is little doubt the State was at least on notice of Shire's claims.

Separately, Shire alleges this Court has jurisdiction under the Uniform Declaratory Judgments Act (UDJA), G.L. 1956 § 9-30-1 et seq., and the State disputes that contention. Broadly, the UDJA provides original jurisdiction to the Superior Court to determine the rights, status, and other legal relations between parties and to construe obligations under contract. See §§ 9-30-1, 9-30-2; Tucker Estates Charlestown, LLC v. Town of Charlestown, 964 A.2d 1138, 1140 (R.I. 2009). Courts have broad discretion to grant or deny relief under the UDJA. See Tucker Estates, 964 A.2d at 1140. The Rhode Island Supreme Court has found this Court to have subject matter jurisdiction under the UDJA to consider the suspension of a contractor from bidding on state projects. See Bradford Assocs. v. R.I. Div. of Purchases, 772 A.2d 485, 489-90 (R.I. 2001) (finding jurisdiction in Superior Court under UDJA to construe rights and responsibilities of parties arising from Purchasing Act and regulations). Accordingly, jurisdiction exists in the case at bar pursuant to the UDJA for declaratory relief.

Subsequent to finding that Shire need not have exhausted administrative remedies, this Court must discuss the standard set forth in the Purchasing Act for review of administrative decisions on the solicitation or award of contracts. The State argues that the heightened standard of review in the Purchasing Act should apply to the Court's consideration of this matter.

Although the case at hand is not and could not have been an administrative appeal under the APA,[18] decisions made regarding solicitations or awards of contracts under the Purchasing Act are typically entitled to a presumption of correctness and judged by a standard akin to that under the APA. Compare § 37-2-51 (standard under Purchasing Act), with § 42-35-15 (standard under APA). The relevant Purchasing Act section provides:

> "The decision of any official, board, agent, or other person appointed by the state concerning any controversy arising under or in connection with the solicitation or award of a contract, shall be entitled to a presumption of correctness. The decision shall not be disturbed unless it was: procured by fraud; in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; arbitrary; capricious; characterized by an abuse of discretion; or clearly unwarranted exercise of discretion." Sec. 37-2-51.

This standard has been described as "extremely similar" to the APA, but "without the procedural limitations." Stern, Sour Grapes, 10 Roger Williams U. L. Rev. 685, 689-90 n.25 (comparing

[18] This is not an administrative appeal under the APA, which limits appeals to contested cases "determined by an agency after an opportunity for hearing." G.L. 1956 § 42-35-1(3) (defining contested case); § 42-35-15 (providing judicial review in Superior Court for contested cases after exhausting administrative remedies); see Bradford Assocs., 772 A.2d at 488-89 (deciding hearing necessary to constitute contested case appealable under the APA). The Purchasing Act does not provide an opportunity for hearing on bid protests, and, as such, the Superior Court does not hear bid protest cases as a court of review. See Stern, Sour Grapes, 10 Roger Williams U. L. Rev. 685, 715 (advocating that instead of current status, "Purchasing Act, like the APA, should place the superior court in the role of a court of review, not that of a trial court").

Purchasing Act and APA). Yet, the Purchasing Act sets an even higher burden through its explicit presumption of correctness. See id.

The presumption of correctness, by the language of § 37-2-51, applies to a decision concerning any controversy arising under or in connection with the solicitation or award of a contract. However, the decisions of the purchasing authority may be disturbed if procured by fraud, if in violation of the constitution or statutory authority, or in the event of certain other abuses. See § 37-2-51 (providing standard for decisions relating to state purchases).

Rhode Island courts have entertained a number of cases challenging the award of bids and applying and construing the presumption of correctness standard. See, e.g., Blue Cross & Blue Shield of R.I. v. Najarian, 865 A.2d 1074 (R.I. 2005); H.V. Collins Co. v. Tarro, 696 A.2d 298, 301 (R.I. 1997); Truk Away of R.I., Inc. v. Macera Bros. of Cranston, Inc., 643 A.2d 811 (R.I. 1994); Goldman, Inc. v. Burns, 109 R.I. 236, 283 A.2d 673 (R.I. 1970); Gilbane Bldg. Co. v. Bd. of Trus. of State Colls., 107 R.I. 295, 267 A.2d 396 (R.I. 1970); see also H.V. Collins Co. v. Williams, 990 A.2d 845, 847-48 (R.I. 2010) (applying § 37-2-51 to bid lawsuit from lowest bidder, but affirming lower court on other grounds). Typically, the cases involve the lowest bidder challenging the award of the contract to a slightly higher bidder, without any allegations of fraud or bad faith. In Gilbane, the court upheld the award to the higher bidder, explaining that "the judiciary will interfere with an award only when it is shown that an officer or officers charged with the duty of making a decision has acted corruptly or in bad faith, or so unreasonably or so arbitrarily as to be guilty of a palpable abuse of discretion." 107 R.I. at 300, 267 A.2d at 399. The court sought to avoid placing purchasing agents in a "legalistic straitjacket." Id. at 301, 267 A.2d at 400.

In the Trukaway case, the Supreme Court disagreed with the trial judge who found there was a "palpable abuse of discretion." 643 A.2d at 816. The court stated:

> "In the absence of bad faith or corruption, a finding of palpable abuse of discretion should be approached with grave caution and be based upon much more compelling evidence or arbitrariness or capriciousness than may be found in mere complexity. We admonish all justices of the Superior Court to exercise great care before issuing an injunction vacating an award of either a state or a municipal contract." Id.

The Court specifically warned against finding abuse of discretion simply because the litigation "creat[es] a sufficient aura of confusion" regarding the bid award decisions. Id.

H.V. Collins considered a trial judge's finding of palpable abuse of discretion because the contract was awarded to the third-lowest bidder, whose bid was deemed not responsive. 696 A.2d at 300-02. The Supreme Court reversed the Superior Court, citing Trukaway and Gilbane, and stating that "to hold otherwise would place the Judiciary in the position of litigating the award of every state and municipal contract and would place public officials in charge of awarding such contracts in the 'legalistic straitjacket' that this Court denounced almost twenty-seven years ago." Id. at 305.

The latest of the seminal bid protest litigation cases, Blue Cross, involved litigation of the State's award of its health care plan contract to United over Blue Cross. 865 A.2d at 1077. As in some of the other cases, the Superior Court judge found palpable abuse of discretion and overturned the award. Id. at 1079-80. The Supreme Court, however, emphasized that "the hurdle to be overcome in overturning a decision made by an awarding authority in the public bid process is very high indeed." Id. at 1081. Relying on the past cases, the Court explained that the award will only be overturned if the purchasing authority "acted corruptly or in bad faith, or so unreasonably or so arbitrarily as to be guilty of a palpable abuse of discretion." Id. Blue Cross

never alleged any bad faith or corruption, nor did the trial judge find any.[19] Id. at 1084-85. Once again, even while the court found the handling of the award "troubling," it determined that any mistakes did not "rise to the level of palpable abuse of discretion." Id. at 1091.

Admittedly, none of these cases considered allegations of fraud, bad faith, or corruption. See Blue Cross, 865 A.2d at 1084-85 ("never alleged bad faith or corruption"); H.V. Collins, 696 A.2d at 301 ("no evidence of 'corruption or corrupt motivation behind the award'"); Trukaway, 643 A.2d at 816 ("no evidence of any bad faith or corruption"); Goldman, 109 R.I. at 238, 283 A.2d at 675 (no suggestion board acted dishonestly, capriciously, or in bad faith); Gilbane, 107 R.I. at 300, 267 A.2d at 399 ("absence of anything remotely suggestive of fraud, collusion or impropriety"). Further, all of these cases that have applied the presumption of correctness standard dealt with declaratory or injunctive relief, not monetary damages. See, e.g., Blue Cross, 865 A.2d at 1077 ("seeking injunctive relief"); H.V. Collins, 696 A.2d at 300 (declaratory judgment that award violated act); Trukaway, 643 A.2d at 812 ("seeking injunctive relief" that all bids be rejected and contract re-advertised); Goldman, 109 R.I. at 237, 283 A.2d at 674 ("action to enjoin the award of a public contract"); Gilbane, 107 R.I. at 296, 267 A.2d at 397 ("enjoin the expenditure" of the additional amount of higher contract). Nonetheless, the plain language of the statute does not limit its application to equitable claims. See § 37-2-51 ("decision . . . concerning any controversy arising under or in connection with the solicitation or award of a contract") (emphasis added).

This Court finds, therefore, that the presumption of correctness standard cited by the State and detailed in the above-referenced case law will apply to some aspects of the case at bar.

[19] Counsel for Blue Cross stated, "Certainly fraud which we don't allege here. I want to make that clear on the record. There is nothing in the record, at least in my view, that suggests there was any corruption here." Blue Cross, 865 A.2d at 1085 n.7.

It is important to note that in this case, allegations of bad faith or corruption were made, and Shire's Complaint against the State is far more complex and not simply based on bid mistakes and low bids, thus differentiating this case from the series of Supreme Court cases discussed above. However, a great portion of Shire's claims rest on "controversy arising under or in connection with the solicitation or award of a contract," and the Purchasing Act standard, by its plain language, will apply to those counts. See § 37-2-51 (establishing presumption of correctness for Purchasing Act controversies). Conscious of the Rhode Island Supreme Court's admonishments to exercise great care in overturning the award made by a purchasing authority, this Court must take heed in finding the State acted corruptly, in bad faith, or with palpable abuse of discretion. See Blue Cross, 865 A.2d at 1081; Trukaway, 643 A.2d at 816. But see Associated Builders, 787 A2d at 1190 (affirming this Court's finding that purchasing decision to require project labor agreements was arbitrary and capricious under § 37-2-51 standard). As applicable, this Court will apply the presumption of correctness in its consideration of this Motion.

B

Statute of Limitations

As another argument in favor of barring some of Shire's claims, the State contends that a three-year statute of limitations applies, precluding claims based on actions before September 30, 2006—three years prior to the filing of Shire's original Complaint. In particular, the State argues the statute of limitations precludes all or part of Counts I (Art. I, § 2 of Rhode Island Constitution), IV (Tortious Interference with Contractual Relations), and V (Tortious Interference with Prospective Business Relations). Shire, however, presents that its claims are

the result of continuing violations, tolling the statute of limitations until the date of its last injury.[20]

The statute of limitations on tort claims against the State of Rhode Island is set by § 9-1-25. It provides, in pertinent part:

> "When a claimant is given the right to sue the state of Rhode Island, any political subdivision of the state, or any city or town by a special act of the general assembly, or in cases involving actions or claims in tort against the state or any political subdivision thereof or any city or town, the action shall be instituted within three (3) years from the effective date of the special act, or within three (3) years of the accrual of any claim of tort. Failure to institute suit within the three (3) year period shall constitute a bar to the bringing of the legal action." Sec. 9-1-25.

Tortious interference with contractual relations and tortious interference with prospective business relations are, by definition, torts. See Mesolella v. City of Providence, 508 A.2d 661, 669-70 (R.I. 1986) (recognizing tort of tortious interference); Restatement (Second) Torts § 766 (1979). Nevertheless, tortious interference claims, at least when not alleged against the State, may fall under the ten-year statute of limitations provided by § 9-1-13(a) because they arise out of a contractual relationship. See McBurney v. Roszkowski, 687 A.2d 447, 448-49 (R.I. 1997). Section 9-1-13(a) states, "Except as otherwise provided, all civil actions shall be commenced within ten (10) years next after the cause of action shall accrue, and not after." This "catch-all" statute of limitations applies, by its own language, only when a different statutory period is not "otherwise provided." See § 9-1-13(a). A more specific statute of limitations, such as that provided by § 9-1-25 for tort actions against the State, trumps the general, catch-all provision of § 9-1-13(a). See G.L. 1956 § 43-3-26 (providing rule of statutory construction that special

[20] Shire also claims that the statute of limitations should toll under the theory of fraudulent concealment. In light of the findings herein, this Court finds it unnecessary to address that argument.

provision shall prevail as exception to general provision). Accordingly, because brought against the State, the three-year statute of limitations applies to Shire's claims of tortious interference, absent any applicable theories of tolling.

Constitutional claims against the State are governed by the three-year limit set forth in § 9-1-14. See Pearman v. Walker, 512 F. Supp. 228, 230 (D. R.I. 1981) (determining federal constitutional claims governed by § 9-1-14). The statute, § 9-1-14(b), provides that "[a]ctions for injuries to the person shall be commenced and sued within three (3) years next after the cause of action shall accrue, and not after . . . ." Injuries to the person, as defined by case law, is construed comprehensively and includes "actions involving injuries that are other than physical," such as "injuries resulting from invasions of rights that inhere in man as a rational being" and "rights to which one is entitled by reason of being a person in the eyes of the law." Commerce Oil Refining Corp. v. Miner, 98 R.I. 14, 20, 199 A.2d 606, 610 (1964). Equal protection and due process claims fall within the purview of personal injuries under § 9-1-14(b). Thus, as with tortious interference, Shire's constitutional claims are subject to a three-year statute of limitations, unless tolled.

However, §§ 9-1-25 and 9-1-14(b) may be tolled under various theories. See Rachal v. O'Neil, 925 A.2d 920, 927 (R.I. 2007); Brenner v. J.H. Lynch & Sons, Inc., 641 A.2d 332, 335-36 (R.I. 1994). One such theory advanced by the Plaintiff is the continuing tort doctrine. Broadly, the doctrine provides that "where a tort involves a continuing or repeated injury, the limitations period is tolled and does not begin to run until the date of the last injury or the date the tortious acts cease." 54 C.J.S. Limitation of Actions § 223 (2011); see 51 Am. Jur. 2d Limitation of Actions § 147 (2012). The doctrine applies "when no single incident in a chain of tortuous activity can fairly or realistically be identified as the cause of the significant harm." 54

C.J.S. Limitation of Actions § 223 (2011). The "plaintiff necessarily must prove a series of events, not that the injury from the first events has not been cured." Lazarini v. United States, 898 F. Supp. 40, 45 (D. P.R. 1995); see De Leon Otero v. Rubero, 820 F.2d 18, 19-20 (1st Cir. 1987) (contrasting continuing acts with a single act that has continuing consequences). "The continuing violation doctrine is an equitable exception . . . ." O'Rourke v. City of Providence, 235 F.3d 713, 730 (1st Cir. 2001). In a hostile work environment case under Title VII, the First Circuit Court of Appeals employed a three-part test to determine if there was a continuing violation: (1) whether the subject matter of acts was sufficiently similar that there was a substantial relationship between the otherwise untimely acts and the timely acts, (2) whether the acts occurred with frequency, repetitively, or continuously, as opposed to being isolated or discrete, and (3) whether the acts were not of sufficient permanency that would trigger an awareness of the need to assert rights. O'Rourke, 235 F.3d at 731.

While Rhode Island does not offer a large body of case law on the continuing torts exception, the courts have applied it in some circumstances. The primary application is in the context of continuing trespass. See West v. Town of Narragansett, 857 A.2d 764, 765 (R.I. 2004) (noting continuing trespass exception to statute of limitations); Mesolella v. City of Providence, 508 A.2d 661, 668-69 (R.I. 1986) (discussing continuing trespass in statute of limitations context); Santilli v. Morelli, 102 R.I. 333, 336, 230 A.2d 860, 862 (1967). However, a couple of recent cases have examined the concept in other areas of law. See, e.g., Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 101 (R.I. 2006) (recognizing continuous tort as applied to conversion and unjust enrichment); Croce v. State, 881 A.2d 75, 79 (R.I. 2005) (applying continuing violation doctrine to an employment discrimination case, albeit determining not a continuing violation). Croce considered application of the continuing tort doctrine in an

employment discrimination case, but declined to apply the exception because the injury suffered was the ongoing effect of a one-time business decision—a layoff. 881 A.2d at 79-80 (determining continuing violation does not apply where simply continuing consequences of singular act).

This Court finds the continuing violation doctrine to apply to both the tortious interference and the constitutional claims in the case at bar. See Narragansett Elec., 898 A.2d at 101 (holding trial justice correct in applying continuous tort doctrine to ongoing conversion of electricity). Here, Shire's claims are the result of a continuing, ongoing relationship with the State, through which Shire claims the State interfered with its liberty and property interests, as well as its contractual and business relations. There is not one event here to which either party can point and label as a singular act causing the continued consequences. Cf. Croce, 881 A.2d at 79-80 (holding continuing violation does not toll statute of limitations where only continuing consequences of one event). Rather, Shire's allegations add up to a number of repeated, continuous, and similar actions on the part of the State. For instance, Shire alleges the State interfered with its liberty interests by directing Shire not to bid on three contracts in exchange for an award of the Union Avenue contract. (2d Am. Compl. ¶¶ 204-08.) Shire alleges the State interfered with its property interests by over time not processing retainages and change orders. Id. at ¶¶ 209-11. Similarly, Shire alleges the State took actions over time to cause it to forego rights under law, interfering with Shire's relations with RIDOA. Id. at ¶¶ 234-43. Shire's claims are based on the totality of these continuing actions by the State and not on individual acts of sufficient permanency.

Shire alleges that throughout, it relied on representations that it would receive the Union Avenue contract. (T. Gammino Aff. ¶¶ 7-9, Jun. 10, 2011.) Those representations are integrally

related to Shire's constitutional and tortious interference claims. Shire claims that in 2005 it was instructed not to bid on Warren Bridge to ensure the award of Union Avenue to Shire, and, prior, it had been instructed similarly to withdraw its bids on Rawson Road and a second I-95 project in order to ensure resolution of issues on other projects. T. Gammino Aff. ¶ 10, 12, Jun. 10, 2011; Thomas Gammino Supplemental Aff. ¶ 5, Dec. 16, 2009; Gammino Dep. 88:3-90:23, Aug. 3, 2010; Peter Donatelli Aff. ¶¶ 11-13, 34, Dec. 16, 2009. From 2005 until 2008, Shire was repeatedly assured, it claims, that it would receive the Union Avenue contract. As late as April 2008, it still appeared Shire might receive Union Avenue. (Brian Stern Aff., Dec. 14, 2011, Exs. 20 (Ltr. from RIDOA to FHWA, Mar. 28, 2008), 21 (Ltr. from FHWA to RIDOA, Apr. 1, 2008).) Shire brought suit just after it realized RIDOA's assurances lost meaning and Shire may not receive the Union Avenue contract. (2d Am. Compl. ¶¶ 133-34, Ex. H (Demand Ltr. from Shire to Stern, May 19, 2008).) On principles of equity, this Court finds that the ongoing representations and sufficiently related conduct on the part of the State toll the statute of limitations under the continuing violation doctrine. See O'Rourke, 235 F.3d at 730 (explaining continuing violation as equitable doctrine); Narragansett Elec., 898 A.2d at 101 (permitting use by trial justice of continuing violation doctrine).

It is this Court's impression that the bases of Shire's allegations, including not only Union Avenue but also the other contracts, allegations, and criminal accusations, are all related and if established would constitute ongoing, continuous torts. As such, the applicable three-year statutes of limitation are equitably tolled so that Shire's claims may include events before September 30, 2006.

C

Anti-Slapp Statute

The State moves this Court to grant summary judgment in its favor as to Counts III (Abuse of Process) and VI (Civil Conspiracy) on the grounds that it is protected by the conditional immunity provided in the Rhode Island Anti-Slapp statute. Shire opposes this motion and argues that the Anti-Slapp statute does not apply to government employees, that this was not a matter of public concern, and that the report to the police was a sham, within the meaning provided by the statute.

The Anti-Slapp statute was enacted to encourage "full participation by persons and organizations in robust discussion of issues of public concern" and to disfavor the increasing litigation intended to chill the exercise of freedom of speech and petition for the redress of grievances. § 9-33-1; see Alves v. Hometown Newspapers, Inc., 857 A.2d 743, 752 (R.I. 2004) ("enacted to prevent vexatious lawsuits against citizens who exercise their First Amendment rights of free speech and legitimate petitioning by granting those activities conditional immunity from punitive civil claims"). The Rhode Island Anti-Slapp law derives from the federal Noerr-Pennington doctrine. See Karousos v. Pardee, 992 A.2d 263, 268-69 (R.I. 2010); Global Waste Recycling, Inc. v. Mallette, 762 A.2d 1208, 1211 (R.I. 2000) ("intended to emulate the federal Noerr-Pennington doctrine"); Hometown Props., Inc. v. Fleming, 680 A.2d 56, 60-61 (R.I. 1996) ("provisions of § 9-33-2 are nearly identical to the Supreme Court's articulation of the constitutionally derived conditional immunity afforded to nonsham petitioning activity under Noerr-Pennington"); see also Alves, 857 A.2d at 753 (noting adoption of Noerr-Pennington test).

The conditional immunity of the Anti-Slapp statute provides, in pertinent part:

> "(a) A party's exercise of his or her right of petition or of free speech under the United States or Rhode Island constitutions in

> connection with a matter of public concern shall be conditionally immune from civil claims, counterclaims, or cross-claims. Such immunity will apply as a bar to any civil claim, counterclaim, or cross-claim directed at petition or free speech as defined in subsection (e) of this section, except if the petition or free speech constitutes a sham. The petition or free speech constitutes a sham only if it is not genuinely aimed at procuring favorable government action, result, or outcome, regardless of ultimate motive or purpose. The petition or free speech will be deemed to constitute a sham as defined in the previous sentence only if it is both:
>
> > (1) Objectively baseless in the sense that no reasonable person exercising the right of speech or petition could realistically expect success in procuring the government action, result, or outcome, and
> >
> > (2) Subjectively baseless in the sense that it is actually an attempt to use the governmental process itself for its own direct effects. Use of outcome or result of the governmental process shall not constitute use of the governmental process itself for its own direct effects.
>
> . . . .
>
> (e) As used in this section, 'a party's exercise of its right of petition or of free speech' shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; or any written or oral statement made in connection with an issue of public concern." Sec. 9-33-2.

Essentially, a party is immune from civil suit for petition or speech in connection with an issue of public concern. See id. However, the immunity does not apply if the petition constitutes a sham, meaning it is "not genuinely aimed at procuring favorable government action, result, or outcome, regardless of ultimate motive or purpose." Id. The petition is only a sham if it is both objectively and subjectively baseless. See id.

1

Application to Government Employees

Whether the Rhode Island Anti-Slapp statute applies to government employees appears to be an issue of first impression. Our Supreme Court has provided some guidance, however, in its

prior interpretation of the Anti-Slapp statute. Importantly, the court has stated, "By enacting the anti-SLAPP statute, the General Assembly intended to secure the vital role of open discourse on matters of public importance, and we shall construe the statute in the manner most consistent with that intention." Hometown Props., 680 A.2d at 62. Furthermore, it was "the General Assembly's clear design that conditional immunity apply to all legitimate petitioning activity that becomes the subject of a punitive claim." Id. at 63 (emphasis added).

The statute itself provides conditional immunity to "a party" who exercises free speech or petition within a number of broad categories. See § 9-33-2(e). It fails to limit the immunity only to private citizens; rather, it expressly discusses its application to "persons and organizations." See §§ 9-33-1, 9-33-2.

Shire's reliance on the correlating Massachusetts statute is misplaced and inapplicable. Among differences between the two, Rhode Island's statute is clear that it covers "any written or oral statement made in connection with an issue of public concern." § 9-33-2(e). Massachusetts' statute, on the other hand, protects statements "falling within constitutional protection of the right to petition government." Mass. Gen. Laws ch. 231, § 59H. Accordingly, Massachusetts does not use the "public concern" test in applying the statute. See Wenger v. Aceto, 883 N.E.2d 262, 266 (Mass. 2008) (stating public concern not element of Massachusetts Anti-Slapp statute). The Commonwealth's Anti-Slapp statute covers "those defendants who petition the government on their own behalf." Kobrin v. Gastfriend, 821 N.E.2d 60, 64 (Mass. 2005). The Massachusetts court reached that interpretation because the statute was enacted to protect "citizens targeted by frivolous lawsuits based on their government petitioning activities" and because the statute applies to claims "based on said party's exercise of its right of petition under the constitution of the United States or of the commonwealth." Id. This language is

distinguishable from the Rhode Island Anti-Slapp statute, which provides immunity to any party making any statement on any issue of public concern. See § 9-33-2.

Moreover, Defendants present a plethora of authorities contradicting the Massachusetts interpretation, many of which determine the Noerr-Pennington doctrine, upon which the Rhode Island Anti-Slapp statute was modeled, applies to government employees. See, e.g., Manistee Town Ctr. v. City of Glendale, 227 F.3d 1090, 1093 (9th Cir. 2000); Mariana v. Fisher, 338 F.3d 189, 200 (3d Cir. 2003); New West, LP v. City of Joliet, 491 F.3d 717, 722 (7th Cir. 2007). Our state's supreme court has directly stated that the Anti-Slapp statute "intended to emulate the Noerr-Pennington doctrine by providing conditional immunity to any person exercising his or her right of petition or free speech . . . ." Global Waste, 762 A.2d at 1211 (emphasis added). In Manistee, the Court of Appeals reasoned that the very principle that led to the Noerr-Pennington immunity doctrine in the first place—the ability to petition in a representative democracy without fear of lawsuit—applied equally to government officials. 227 F.3d at 1093. The California and Nevada state anti-slapp statutes have also been interpreted to protect government officials. See Bradbury v. Superior Court, 49 Cal.App.4th 1108; John v. Douglas Cnty. Sch. Dist., 219 P.3d 1276 (Nev. 2009).

Here, the State claims the Anti-Slapp statute applies to its reporting to the police of the suspicions that a Shire employee may have been improperly accessing portions of the PMP computer database. While there may be conflicting facts regarding who first contacted whom and at whose instruction, there is no dispute that Lisa Martinelli, counsel for RIDOT, relayed the suspicions and at least basic information to Detective Lemont of the Rhode Island State Police. See Lisa Martinelli Dep. 25:1-26:2, 30:9-13, Mar. 11, 2011; John Lemont Dep. 12:9-24, Apr. 29, 2010; John Lemont Aff. 3, May, 30, 2008; Lisa Martinelli Dep. 252:4-254:6, Oct. 13, 2011.

Martinelli, a government employee, should be considered a party within the terms of § 9-33-2. See Global Waste, 762 A.2d at 1211 (intending conditional immunity to reach any person petitioning matter of public concern). Consistent with the Rhode Island Supreme Court's interpretation of the Anti-Slapp statute, Martinelli's petitioning activity should be covered to secure the vital role of open discourse on matters of public importance. Hometown Props., 680 A.2d at 62 (discussing General Assembly's intent to secure open discourse and court's role to construe statute consistent with that intent). Therefore, this Court is persuaded that the Anti-Slapp statute protects government employees' statements made in connection with an issue of public concern.

2

Public Concern

This state's Supreme Court considered the meaning of "issues of public concern" in Global Waste Recycling, Inc. v. Mallette, 762 A.2d 1208 (R.I. 2000). There, the court found the term was not overly broad or indefinable, but rather enjoys a long, distinguished, and unchallenged meaning. Global Waste, 762 A.2d at 1214 (citing Connick v. Myers, 461 U.S. 138 (1983). Issues of public concern are any issues "fairly considered as relating to any matter of political, social, or other concern to the community . . . ." Connick, 461 U.S. at 146. Whether speech is a matter of public concern is a question of law "determined by the content, form, and context of a given statement." Id. at 147-48. So long as the statement regards an issue of importance within the community, it is seemingly of public concern. See Global Waste, 762 A.2d at 1208-14. But see Hoffman v. Davenport-Metcalf, 851 A.2d 1083, 1088 (R.I. 2004) (determining causes of action in private landlord-tenant dispute not issues of public concern sufficient to invoke Anti-Slapp statute protection). Where the allegations are simply matters of

personal concern between the parties, there may not be sufficient public concern. See Hoffman, 851 A.2d at 1088.

Here, the Court is convinced that this is a matter of public concern. See Connick, 461 U.S. at 146-48 (providing definition and stating public concern a question of law). The PMP is a State computer system, accessible by user name and password, with tiered levels of access to information. (Lemont Aff. 2, May 30, 2008.) While at least some information on the PMP is publicly available, a contractor is not intended to have access to all information and communications present on the system. (David Giardino Aff. ¶¶ 3-15, Dec. 12, 2011.) An RIDOT employee became concerned that Shire may have been accessing information on the PMP to which Shire should not have had access. (Lemont Dep. 23:5-13, Apr. 29, 2010.) As a result of the ensuing investigation by Detective Lemont, "it was determined that there have been numerous unauthorized, unlawful accesses to the PMP computer system from the IP address of Shire Corporation . . . ." (Pl.'s Obj. to Defs. Mot. for Summ. J. based on the R.I. Anti-Slapp Statute (Pl.'s 3/18/11 Obj.) Ex. A (Police Narrative, Dec. 19, 2009) at 11.) The Shire employee involved was arrested and charged with violations of G.L. 1956 § 11-52-2, Access to a Computer System for Fraudulent Purposes, and § 11-52-3, Intentional Access, Alteration, Damage, or Destruction. See Lemont Aff. 13, May 30, 2008 (providing grounds for arrest warrant). Eventually, Shire was suspended from participation in the bid process "to protect the public interest by ensuring that FHWA conducts business only with presently responsible persons, thereby maintaining the integrity of Federal programs." (Pl.'s Second Supplemental Mem. in Obj. to Defs.' Mot. for Summ. J. based on the R.I. Anti-Slapp Statute (Pl.'s 11/29/11 Obj.) Ex. S (Ltr. from FHWA to Shire, Sep. 3, 2008).) Shire, in the end, accepted responsibility for the alleged misconduct of its employee without admitting criminal or civil liability. (Defs.' 12/16/10

Mem. Ex. N (Administrative Settlement and Compliance Agreement, Apr. 24, 2009).) The issue of improper access, potentially constituting a crime, to a password-protected online RIDOT database used to manage public works projects is clearly a matter of public concern.

3

Objectively and Subjectively Baseless to be a Sham

The speech or petition constitutes a sham, and thus is not protected by the Anti-Slapp statute, only if it is "not genuinely aimed at procuring favorable government action, result, or outcome, regardless of ultimate motive or purpose." Sec. 9-32-2(a) (emphasis added). Additionally, the speech or petition must be both objectively and subjectively baseless. Id. It must be objectively baseless "in the sense that no reasonable person exercising the right of speech or petition could realistically expect success in procuring the government action, result, or outcome." Id. at (a)(1). Our supreme court has never held that a defendant's actions were objectively baseless. Karousos, 992 A.2d at 269. As long as a "litigant could reasonably have expected a successful outcome" as a result of the speech, it is not objectively baseless. Cove Rd. Dev. v. W. Cranston Indus. Park Assocs., 674 A.2d 1234, 1239 (R.I. 1996) (suggesting objectively baseless only when "frivolous or lacking merit").

To be subjectively baseless, the speech would have to be "actually an attempt to use the governmental process itself for its own direct effects. Use of outcome or result of the governmental process shall not constitute use of the governmental process itself for its own direct effects." Sec. 9-32-2(a)(2). In other words, to prove that the speech or petition was subjectively baseless, it would have to be proven that it was made for its direct or immediate effects, regardless of whether and not it was made for its outcome. See Karousos, 992 A.2d at 271. It is essential to differentiate that there is no issue with the speaker being motivated by the

outcome or result of the process; the issue is whether the speaker "utilized the process itself rather than the intended outcome in order to hinder and delay [the other party]." Pound Hill Corp. v. Perl, 668 A.2d 1260, 1264 (R.I. 1996). This interpretation is in harmony with the language of the statute requiring that a sham is not aimed at procuring favorable government action, regardless of the ultimate motive or purpose behind the action. See § 9-32-2 (judging sham only based on whether aimed at procuring favorable government action, ignoring ultimate motive or purpose).

This subjectively baseless concept under the Rhode Island Anti-Slapp statute is derived from the Noerr-Pennington doctrine. See id. at 1264-65 (applying federal Noerr-Pennington cases). In particular, the United States Supreme Court has expounded that it constitutes a subjectively baseless sham when "persons use the governmental process—as opposed to the outcome of that process," such as where the activity is "not genuinely aimed at procuring favorable government action at all" but intended to cause delay or injury through the process itself and not the outcome. City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 (1991) (using language extremely similar to the Rhode Island Anti-Slapp statute) (emphasis in original) (internal citations omitted). To the contrary, the intent to achieve something—an ulterior motive—through the outcome or result of the process does not preclude Noerr-Pennington (or, analogously, Anti-Slapp) protection. See id. at 381; see also Prof. Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 59 (1993) ("we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham . . . . even an improperly motivated lawsuit [is afforded protection] unless such litigation is baseless").

Based on the information possessed by Shire, an RIDOT employee believed Shire may have been improperly accessing information. (Lemont Dep. 23:5-13, Apr. 29, 2010.) RIDOT then conducted some level of internal investigation of the suspicions. (Lemont Aff. 6-7, May 30, 2008.) Although unclear in the record, it appears that RIDOT contacted Plexus Corporation, the state subcontractor who developed the PMP software, and then had an internal meeting regarding the suspicions and investigation. See Lemont Aff. 6-7, May 30, 2008; Martinelli Dep. 36:23-39:11, Mar. 11, 2011; Martinelli Dep. 259:8-260:6, Oct. 13, 2011. The investigation revealed that the username account of an RIDOT employee was logging in to the PMP system from the same IP address as the Shire employee within minutes of each other and on days on which the RIDOT employee was on vacation. (Lemont Aff. 6-7, May 30, 2008.) This contradicted statements of the RIDOT employee that he rarely ever logged in to the PMP at all and had never done so from Shire's office. Id.

While there are disputed facts regarding the exact circumstances, Martinelli relayed this information to Detective Lemont—constituting the speech or petition in question. (Martinelli Dep. 30:9-13, Mar. 11, 2011.) Given the information that the State had, it was objectively reasonable for them to believe communicating it would procure favorable government action, result, or outcome. See § 9-32-2 ("The petition or free speech constitutes a sham only if it is not genuinely aimed at procuring favorable government action, result, or outcome, regardless of ultimate motive or purpose"). A reasonable person in the situation would believe improper computer access, such as misuse of another individual's username and password, constitutes a crime and matter of public concern. Reporting this information would be objectively likely to produce a favorable government outcome in either punishing any wrongdoer or better securing the PMP system. Thus, a reasonable person could have expected a successful outcome or result

from his or her speech. See Cove Rd. Dev., 674 A.2d 1239 (providing objectively baseless standard). Our courts apparently never have found a speech or petition to be objectively baseless. See Karousos, 992 A.2d at 269. This Court declines to do so here. Defendants' speech was not objectively baseless.

This Court also finds that the speech was not subjectively baseless. In this case, Martinelli herself thought the allegations were reasonable based on the facts relayed to her. (Martinelli Dep. 373:2-376:1, Oct. 13, 2011.) Whether or not the State intended the outcome of the speech—arrest of the Shire employee and/or suspension of Shire from competitive bidding process—is of no moment. See Pound Hill, 668 A.2d at1264 (explaining issue is whether actor used the process itself, not the outcome, to harm the other party). A subjectively baseless act is not aimed at producing favorable government action in the end. See City of Columbia, 499 U.S. at 380. Here, there is no evidence the State intended to use the process, rather than the result, to effect Shire. Rather, the State believed the information reported to the police would lead to favorable government action. See § 9-32-2. Even an improperly-motivated lawsuit, if that were the case here, is afforded protection when it is not objectively and subjectively baseless. See Prof. Real Estate Investors, 508 U.S. at 59 (confirming bad intent or motive cannot constitute sham); § 9-32-2(a) ("regardless of ultimate motive or purpose"). Therefore, the Court does not find the State's action to be subjectively baseless.

Further, this Court will award costs and attorneys fees to compensate for the expenses related to the two counts barred by the Anti-Slapp statute. See § 9-33-2(d) ("the court shall award the prevailing party costs and reasonable attorney's fees"); Alves, 857 A.2d at 757 ("an award of costs and reasonable attorneys' fees [is] mandatory").

D

Remaining Counts

Having granted summary judgment in favor of Defendants on Counts III (Abuse of Process) and VI (Civil Conspiracy), this Court will now address the remaining counts in seriatim. The State has moved for summary judgment on all counts, while Shire maintains that, at minimum, there are genuine disputes of material fact.

1

Constitutional Claims (Count I)

Shire claims substantive due process violations of its liberty interest in bidding on public works contracts and its property interest in awarded contracts, as well as equal protection violations for allegedly treating Shire differently from similarly situated contractors for the purpose of processing change orders and other payments. The State argues, however, that Shire does not have protected liberty or property interests and that Shire's competitors are not similarly situated.

a

Substantive Due Process

Article I, section 2 of the Rhode Island Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws." The guarantee of substantive due process, as distinct from procedural due process, "acts as a bar against certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." State v. Germane, 971 A.2d 555, 574 (R.I. 2009) (internal citations omitted); see Jolicoeur Furniture Co. v. Baldelli, 653 A.2d 740, 751 (R.I. 1995). To prove a violation of substantive due process, the plaintiff

must show the government action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Germane, 971 A.2d at 584 (quoting Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 10 (R.I. 2005)). As a first circuit case explains, substantive due process:

> "does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks the conscience, or action that is legally irrational in that it is not keyed to any legitimate state interests." PFZ Props., Inc. v. Rodriguez, 928 F.2d 28, 31-32 (1st Cir. 1991) (internal citations omitted).

In analyzing alleged substantive due process violations, the "threshold question" is whether there is a fundamental right at stake. Riley v. R.I. Dep't of Envtl. Mgmt., 941 A.2d 198, 205-06 (R.I. 2008). If so, the governmental action is subject to strict scrutiny, but if not, the action is analyzed under minimal scrutiny. Id. at 206. When there is no fundamental right at issue, substantive due process guards only against clearly arbitrary and capricious government action. Moreau v. Flanders, 15 A.3d 565, 581 (R.I. 2011); Riley, 941 A.2d at 206. However, the first, preliminary inquiry is whether the plaintiff was deprived of a guaranteed, fundamental right. See Brunelle v. Town of S. Kingstown, 700 A.2d 1075, 1084 (R.I. 1997) (holding plaintiff must prove arbitrary or capricious government action directed at protected fundamental right); Jolicoeur Furniture Co., 653 A.2d at 749-51 (stating constitutional line crossed only when basic and fundamental principle transgressed).

It is well-established law that a simple breach of contract does not amount to an unconstitutional deprivation of property. Redondo-Borges v. U.S. Dep't of Hous. & Urban Dev., 421 F.3d 1, 10 (1st Cir. 2005). The existence of a state contract "does not confer upon the contracting parties a constitutionally protected property interest." Id.; see Jolicoeur Furniture

Co., 653 A.2d at 751 (explaining fact that party to contract is state does not convert common law claim into constitutional due process claim); see also Clark Constr. Co. v. Pena, 930 F. Supp. 1470, 1485, 1487 (determining right to be awarded public construction project contract, even when determined to be low-bidder, not protected property interest). Some courts have indicated that there is a protected property interest when the state contract includes a provision that the state can only terminate the contract for cause. See Linan-Faye Constr. Co. v. Hous. Auth'y of Camden, 49 F.3d 915, 932 (3d Cir. 1995); see also Wilson v. Moreau, 440 F. Supp. 2d 81, 98 (D. R.I. 2006) (determining police chief who could not be fired except for cause has property interest for procedural due process purposes). Awarded public contracts with the "quality of permanence" provided by a "for cause" provision are, at least in some instances, protected property interests. See Women's Dev. Corp. v. City of Central Falls ex rel. Smith, 968 F. Supp. 786, 788-90 (D. R.I. 1997) (discussing potential property interest in public contract for procedural due process purposes and distinguishing general contract rights from those coupled with "for cause" status). But see Bradford Assocs., 772 A.2d at 490 (ruling plaintiffs failed to demonstrate property interest in government contract).

Some federal circuits, however, have held that "not all property interests worthy of procedural due process protection are protected by the concept of substantive due process." Reich v. Beharry, 883 F.2d 239, 244 (3d Cir. 1989). Procedural and substantive due process are nearly always analyzed separately and under different standards. See, e.g., L.A. Ray Realty v. Town Council of Cumberland, 698 A.2d 202, 211-14 (R.I. 1997) (analyzing substantive and procedural due process separately in regard to zoning actions). In fact, although an interest may be protected by procedural due process, it does not necessary follow that it is protected by

substantive due process; the interests protected by substantive due process are "much narrower." Gonzalez-Fuentes v. Molina, 607 F.3d 864, 880 n.13 (1st Cir. 2010).

This Court is not aware and has not been made aware of any controlling authority determining that all public contracts terminable by the State only for cause carry property interests afforded due process protection. In Jolicoeur Furniture, the Rhode Island Supreme Court considered the property interest, if any, acquired through a long, drawn-out public contract process that included various assertions and accommodations on each side to consummate the sale of land. 653 A.2d at 743-46. The State eventually declined to sell despite the contract, and the court found no substantive due process property interest in the contractual obligations. Id. at 751 (determining constitutional line had not been crossed and deficiencies in state's behavior not conscience-shocking). Both the Rhode Island Supreme Court and the First Circuit have been hesitant to find property interests in state contracts, wary of turning all public contracts into substantive due process claims. See Jolicoeur Furniture, 653 A.2d at 751; Redondo-Borges, 421 F.3d at 10.[21]

Shire claims that the awarded construction contracts are terminable by the State only for-cause, but Shire does not provide direct evidence of such a provision in the contracts. Regardless, this Court is of the opinion that the cited case law is not controlling and not on point

[21] Redondo-Borges states:

> "We have held with a regularity bordering on echolalic that a simple breach of contract does not amount to an unconstitutional deprivation of property. Many of our sister circuits have adopted a similar stance. This view of the law makes eminently good sense. To hold otherwise would run the risk of transmogrifying virtually every dispute involving an alleged breach of contract by a state or a state agency into a constitutional case. We eschew so rash a course and hold, consistent with our prior precedents, that the existence of a state contract, simpliciter, does not confer upon the contracting parties a constitutionally protected property interest." 421 F.3d at 10 (internal citations omitted).

because of the differences between procedural and substantive due process. See Gonzalez-Fuentes, 607 F.3d at 880 n.13 (explaining substantive due process protection much narrower than procedural). Shire's substantive due process claims based on their alleged property interests in awarded contracts relate to the State not paying for extra work and not processing retainages and change orders in a timely manner. (2d Am. Compl. ¶¶ 209-11.) This is in stark contrast to Linan-Faye, a case cited by Shire for a protected property interest. 49 F.3d at 932. In Linan-Faye, the State entirely terminated a construction contract. Id. at 918. Here, Shire's claims more closely relate to performance of the contract, and this jurisdiction has made it clear that public contract disputes more simply and more aptly characterized as breach of contract actions should not be converted into unconstitutional deprivations of property interests. See Jolicoeur Furniture Co., 653 A.2d at 751; see also Redondo-Borges, 421 F.3d at 10. This Court does not find a protected property interest in the awarded contracts so as to entitle Shire to its constitutional claims as alleged.

A liberty interest to bid on public works contracts is only implicated when prevention of bidding is "based on charges of fraud or dishonesty." See Bradford Assocs., 772 A.2d at 490 (quoting Mainelli v. United States, 611 F. Supp. 606, 613 (D. R.I. 1985)); Transco Secs., Inc. of Ohio v. Freeman, 639 F.2d 318, 321 (6th Cir. 1981) ("bidder's liberty interest is affected when that denial [to bid] is based on charges of fraud and dishonesty"); see also Redondo-Borges, 421 F.3d at 8 n.3 (citing Transco with approval in first circuit decision). Under Rhode Island law, it is clear that suspension of a contractor does not impinge upon any protected liberty interest where there is no charge of fraud or dishonesty. See Bradford Assocs., 772 A.2d at 490. Presumably, directing a contractor not to bid on certain contracts, without accusing the

contractor of fraud or dishonesty, would similarly not deprive that contractor of any protected liberty interest to bid on public works. See id.

In its Complaint, Shire alleges that the State violated its liberty interests by instructing Shire not to bid on various projects and to withdraw its bid on others, and by not awarding the Union Avenue contract to Shire. (2d Am. Compl. ¶¶ 204-13.) The facts as presented to this Court indicate that the State directed Shire to withdraw its bids on the second I-95 and Rawson Road projects to ensure resolution of pending issues on other projects, allegedly implying that there would be adverse economic consequences to Shire if it did not withdraw the bids. T. Gammino Supplemental Aff. ¶ 5, Dec. 16, 2009; T. Gammino Aff. ¶ 12, Jun. 10, 2011; Donatelli Aff. ¶ 34, Dec. 16, 2009; T. Gammino Dep. 70:8-71:23, Aug. 3, 2010. RIDOA allegedly directed Shire not to submit a bid on Warren Bridge in order to alleviate political concerns surrounding the Barrington Bridge and Point Street issues and to ensure the award of the Union Avenue contract to Shire. T. Gammino Aff. ¶ 10, Jun. 10, 2011; Donatelli Aff. ¶¶ 11-13, Dec. 16, 2009; T. Gammino Dep. 88:3-90:23, Aug. 3, 2010. However, Beverly Najarian of RIDOA disputes that Shire was told not bid on Warren Bridge in order to receive Union Avenue. (Beverly Najarian Dep. 46:9-47:11, 61:1-64:20, Apr. 28, 2010.)

Either way, under no set of facts presented did the State accuse Shire of fraud or dishonesty when it allegedly caused Shire to withdraw or forego bids on the second I-95, Rawson Road, and Warren Bridge contracts. See Transco Secs., 639 F.2d at 321 (holding bidder's liberty interest affected only when denial of bid based on charges of fraud and dishonesty). Any impropriety alleged against the State has no bearing on this analysis under law because the denials of bidding opportunities were not based on charges of fraud. See Bradford Assocs., 772 A.2d at 490 (indicating liberty interest implicated when based on charges of fraud

or dishonesty). Therefore, the Court does not find any substantive due process violation of a protected liberty interest.[22] The Court grants summary judgment in favor of the Defendants on the substantive due process claims.

b

Equal Protection

The Rhode Island equal protection clause "proscribes governmental action which treats one class of people less favorably than others similarly situated." Perrotti v. Solomon, 657 A.2d 1045, 1049 (R.I. 1995). To allege an equal protection violation by the State, a plaintiff must show that "(1) [he or she], compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." Providence Teachers' Union Local 958, AFL-CIO, AFT v. City Council of Providence, 888 A.2d 948, 954 (R.I. 2005). Cases of bad faith or malicious intent to injure—as opposed to cases involving suspect classes—are infrequently found. See Yearardi's Moody St. Rest. & Lounge, Inc. v. Bd. of Selectmen of Randolph, 932 F.2d 89, 94 (1st Cir. 1991); PFZ Props., Inc., 928 F.2d at 32-33 (noting this sort of equal protection claim must involve "gross abuse of power, invidious discrimination or fundamentally unfair procedures"). When a suspect classification is not involved, the government action is subject to only minimal scrutiny. See Riley, 941 A.2d at 206; Mackie v. State, 936 A.2d 588, 596 (R.I. 2007); Cherenzia v. Lynch, 847 A.2d 818, 823 (R.I. 2004).

[22] Even if there had been a protected liberty interest or a protected property interest, the State's actions would have had to rise to the level of being clearly arbitrary and unreasonable, with no substantial relation to the public health, safety, morals, or general welfare. See Kaveny, 875 A.2d at 10. The State would have had to have engaged in an abuse of process that shocks the conscience. See PFZ Props., 928 F.2d at 31-32.

Where the parties said to have been treated differently are not similarly situated, it is unnecessary to proceed any further in the constitutional analysis. See Moreau, 15 A.3d at 587 (determining union members not similarly situated to elected public officials and therefore no equal protection violation). The test for whether parties are similarly situated is "whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated." Tapalian v. Tusino, 377 F.3d 1, 6 (1st Cir. 2004). Facts are considered to determine whether reasoned analogy supports a finding that the two parties to be compared are similarly situated. See id. The ultimate determination is a fact-bound inquiry normally reserved for the jury, unless there is sufficient proof of a high degree of similarity. Cordi-Allen v. Conlon, 494 F.3d 245, 251 (1st Cir. 2007).

Here, the State and Shire disagree whether Shire is similarly situated with its competitors, Aetna Bridge Corporation and Cardi Corporation. The basis of Shire's equal protection claim is that the State did not process retainages and change orders for Shire and make payments in a timely fashion to Shire, as compared with Aetna and Cardi. (2d Am. Compl. ¶¶ 211, 214.) Shire claims that as of July 2007, RIDOT was allegedly withholding retainage in excess of $1,000,000 and payment in excess of $1,000,000 for completed projects. 2d Am. Compl. ¶¶ 120-21; Laura Gammino Aff. ¶¶ 3-4, Jun. 9, 2011. As of August 2007, according to Shire, RIDOT allegedly withheld approval on Change Orders in an amount exceeding $790,000, and for some change orders, RIDOT withheld approval for over 1,000 days. 2d Am. Compl. ¶¶ 122-23; L. Gammino Aff. ¶ 5, Jun. 9, 2011. Shire asserts that these amounts and periods of time far exceed those for Cardi and Aetna.[23] (2d Am. Compl. ¶¶ 120-24.)

[23] The Court notes that Shire has not set forth evidence in the record to establish this assertion that the amounts and time periods on payments and change orders in fact differ between Shire, Cardi, and Aetna.

Even if these assertions were true, judging in the light most favorable to Shire, the non-moving party, the State raises significant questions whether the other companies were similarly situated. See Hill, 11 A.3d at 113 (providing standard that evidence must be judged in light most favorable to non-moving party). Each public works project is different, overseen by different individuals, and subject to different plans. Gammino himself acknowledged that Cardi is a larger company than Shire and the two companies bid on differently sized projects. (T. Gammino Dep. 147:6-19, Aug. 3, 2010.) Further, as a result of the Point Street Settlement Agreement, Shire's work involved a trust account managed by a surety to control all payments and review and report Shire's work progress to the State. See Defs. 12/16/10 Mem. Ex. A (Settlement Agreement, Jan. 31, 2005), at 4-5. As a result of the Barrington Bridge Settlement Agreement, some of Shire's work also required an oversight committee to review and discuss reports of job progress, change orders, and payments between Shire and the State. See Defs. 12/16/10 Mem. Ex. Q (Settlement Agreement, Sep. 29, 2006), at 3-4. Shire may present that it still managed all of its jobs, but there is no evidence that the companies Shire claims are similarly situated shared these significant characteristics raised by the State. See T. Gammino Dep. 36:14-37:24, Aug. 3, 2010; T. Gammino Aff. ¶ 16; 2d Am. Compl. ¶¶ 123-24. Shire, nonetheless, does present evidence that Aetna and Shire were fierce competitors, and Aetna allegedly "had no problems getting change orders processed quickly." T. Gammino Aff. ¶ 14-15, Jun. 10, 2010.

At the very least, there is a genuine dispute of material fact whether Shire is similarly situated with the named competitors. See Shelter Harbor Conservation Soc'y, 21 A.3d at 343 (stating summary judgment improper where genuine dispute of material fact). This question of fact is best left for the jury. See Cordi-Allen, 494 F.3d at 251 (discussing similarly situated as ultimately a determination of fact). If the other companies are not similarly situated, the equal

protection claim would fail. See Moreau, 15 A.3d 587 (holding no equal protection violation where not similarly situated).

However, even if a factfinder determined Shire and its competitors were similarly situated, equal protection "does not require perfectly equal treatment for every individual." Perotti, 657 A.2d at 1049 (quoting Felice v. R.I. Bd. of Elections, 781 F. Supp. 100, 105 (D. R.I. 1991)). Shire alleges that the equal protection violation is grounded on "malicious or bad faith intent to injure." See Providence Teachers' Union, 888 A.2d at 954 (providing elements for alleging equal protection); Pl.'s 6/10/11 Obj. 48 (explaining Shire's equal protection claim). But, the law is clear that "different treatment does not itself prove bad faith intent to injure." Yearardi's Moody St. Rest. & Lounge, 932 F.2d at 92.

In such a case where there is no invidious discrimination or interference with fundamental rights, courts "insist on more than . . . gossamer proofs . . . before a jury will be entitled to find a bad faith intent to injure in violation of the equal protection clause." Yearardi's Moody St. Rest. & Lounge, 932 F.2d at 94. The plaintiff "must offer independent evidence of malice." Faerber v. City of Newport, 51 F. Supp. 2d 115, 122 (D. R.I. 1999). The plaintiff must do so by "identify[ing] and relat[ing] specific instances where persons similarly situated in all relevant aspects were treated differently, instances which have the capacity to demonstrate that [plaintiffs] were singled . . . out for unlawful oppression." Rubinovitz v. Rogato, 60 F.3d 906, 910 (1st Cir. 1995) (quoting Dartmouth Review v. Darmouth Coll., 889 F.2d 13, 19 (1st Cir. 1989) (internal citations omitted). The malice or bad faith standard "must be scrupulously met." Providence Teachers' Union, 888 A.2d at 954 (quoting LeClair v. Saunders, 627 F.2d 606, 611 (2d Cir. 1980)); see Faerber, 51 F. Supp. 2d at 122 (noting "lofty bar to cross"). Yet, summary judgment may be denied on a malicious bad faith claim where "there is enough indication of a

malicious orchestrated campaign causing substantial harm." Rubinovitz, 60 F.3d at 912; see Tapalian, 377 F.3d at 7 (upholding equal protection violation where jury "rationally could infer that [defendant] had engaged in a malicious orchestrated campaign causing substantial harm, thereby constituting gross abuse of power") (citations omitted).

In a relatable first circuit case, the Court of Appeals considered a claim that a government agency refused to process construction drawings for a hotel development project, allegedly treating the developer differently than others similarly situated. See PFZ Props., Inc., 928 F.2d at 32; see also R.I. Depositers Econ. Prot. Corp. v. Brown, 659 A.2d 95, 100 (R.I. 1995) (providing Rhode Island constitutional equal protection rights similar to those under federal constitution). The court noted that an equal protection violation may occur in situations of "gross abuse of power, invidious discrimination or fundamentally unfair procedures"; however, in that case, the developer alleged only that the government treated its project differently from others. PFZ Props., Inc., 928 F.2d at 32. This kind of allegation would "not normally amount to a violation of the developer's . . . constitutional rights." Id. Affirming the lower court's dismissal for failure to state a claim, the Court of Appeals cautioned that every claim from a "disappointed developer" involves some allegation of improper treatment or abuse of authority, and simply labeling the questionable treatment as a constitutional violation does not properly raise the case to that level. See id. at 32-33.

Here, Shire has failed to identify and provide evidence of specific instances where similarly situated companies were treated differently, such that a factfinder could detect a malicious, orchestrated campaign causing substantial harm. See Tapalian, 377 F.3d at 7; Rubinovitz, 60 F.3d at 910. The evidence in the summary judgment record simply alleges that as of July 2007, RIDOT was withholding retainage in excess of $1,000,000, payment in excess of

$1,000,000, and change orders in excess of $790,000, and was withholding approval on change orders for over 1,000 days. L. Gammino Aff. ¶¶ 3-5, Jun. 9, 2011. Impressive as the numbers may be, Shire has failed to identify specific instances through competent evidence to establish that these amounts differ from others similarly situated and are the result of bad faith or malice causing substantial harm and constituting gross abuse of power. See Hill, 11 A.3d 113 (noting summary judgment burden on non-moving party to set forth competent evidence); Tapalian, 377 F.3d at 7 (requiring defendant "engaged in a malicious orchestrated campaign causing substantial harm, thereby constituting gross abuse of power"); Rubinovitz, 889 F.2d at 19 (requiring plaintiff "identify and relate specific instances" of disparate treatement). Admittedly, this is a high standard to meet, and Shire's evidence falls short.

A scrupulous review of the record reveals that in Shire's Complaint, it alleges that the State treated Shire differently in response to Shire exercising its rights under law and refusing the State's "extortionate" demands. 2d Am. Compl. ¶¶ 211, 214; see Providence Teachers' Union, 888 A.2d at 954 (requiring malice and bad faith standard "be scrupulously met"). However, the Complaint alleges only on information and belief that the retainage and payment amounts withheld from Shire exceeded the amounts withheld for its competitors. See 2d Am. Compl. ¶¶ 120-22. Shire claims that from 2005-2009 the average number of days from bid opening to the award of the contract for Shire was ninety-seven days, while for Cardi it was forty-eight days, for D'Ambra Construction it was forty-three days, and for Aetna it was fifty-five days. (2d Am. Compl. ¶ 124.) Yet, Shire provides no basis for this calculation, nor does Shire substantiate it in any of its supporting affidavits and exhibits.

At oral argument, counsel for Shire relied on the fact that allegedly public information on the PMP showed retainages being released to other contractors, but counsel acknowledged there

may not be any information in the record actually establishing the payment of retainages to everyone other than Shire. See Tr. 29:19-31:4, Jan. 6, 2012 (acknowledging potential lack of evidence in record); see also T. Gammino Dep. 158:24-159:11, Aug. 3, 2010 (testifying retainages released to other contractors could be viewed on the PMP system). Gammino, in his deposition, offered that through conversations with other contractors such as Aetna, he learned that their retainages were reduced in some situations, and without explaining how he knew, Gammino stated that Aetna's change orders were always processed quickly. T. Gammino Dep. 144:5-13; 158:12-159:11, Aug. 3, 2010. Gammino acknowledged, however, that releasing retainage is up to the RIDOT chief of construction based on whether the contractor is doing a fine job or doing what RIDOT wanted the contractor to do on the project. T. Gammino Dep. 153:13-154:18, Aug. 3, 2010. The purpose of withholding retainage, according to Gammino, is so that the State has funds to repair any problems that arise on the project or so that work may be completed if the contractor walks off the job. T. Gammino Dep. 155:3-156:1, Aug. 3, 2010. Based on this, it is possible—even likely—that the State withheld retainage for reasons other than malice or bad faith, and Shire has not convinced this Court that the amounts withheld were in malicious bad faith with intent to injure.

Accordingly, Shire's evidence falls short of establishing malicious or bad faith intent to injure Shire through the alleged selective treatment. See PFZ Props., Inc., 928 F.2d at 32 (requiring more than showing of different treatment). Additionally, Shire asserts that Aetna "had no problems getting Change Orders processed quickly," without providing the foundation for that knowledge. See T. Gammino Aff. ¶ 15, Jun. 10, 2010. As another example, Shire claims the State refused to acknowledge extra grouting work on Barrington Bridge concrete box-beam keyways when the State had issued change orders to Cardi for the same type of grouting work on

another project. (Pl.'s 6/10/11 Obj. 51-52.) However, once the State became aware of this, the State demanded repayment from Cardi. Id. at 52. Without doubt, Shire alleges what it feels amounts to bad faith or malice through various facts detailed in the copious papers; however, Shire does not, as a matter of law, approach or exceed the standard of gross abuse of power, invidious discrimination, or fundamentally unfair procedures. See PFZ Props., Inc., 928 F.2d at 32-33.

There is no independent evidence here of malice causing the allegedly disparate treatment through an orchestrated campaign constituting abuse of power. See Rubinovitz, 60 F.3d at 912 (denying summary judgment only where evidence of "malicious orchestrated campaign"); Faerber, 51 F. Supp. 2d at 122 (requiring plaintiff "offer independent evidence of malice"). Any sort of unfavorable treatment from the government may lead to a plaintiff bringing claims similar to those of Shire, and simply labeling the treatment a violation of equal protection does not make it such. See PFZ Props., Inc., 928 F.2d at 32-33. Shire fails to identify and relate through competent evidence specific instances of disparate treatment. See Rubinovitz, 60 F.3d at 910 (requiring plaintiff identify and relate specific instances). Even judged in the light most favorable to Shire, the record here fails to clear the lofty bar marking a malicious or bad faith intent to injure. See Yearardi's Moody St. Rest. & Lounge, 932 F.2d at 94; Faerber, 51 F. Supp. 2d at 122. Considering that equal protection violations on the basis of bad faith or malicious intent to injure are infrequently found, this Court grants summary judgment in favor of the Defendants on the equal protection claims, and consequently, Count I of Shire's Complaint in whole. See Yearrardi's Moody St. Rest. & Lounge, 932 F.2d at 94 (stating such cases are infrequently found).

2

RICO (Count II)

In Count II, Shire claims violations of the Rhode Island Racketeering Influenced and Corrupt Organizations Act (RICO), codified at G.L. 1956 § 7-15-1 et seq. Specifically, Shire alleges that State employees engaged in racketeering activity involving extortion by an enterprise. The Defendants deny that there was racketeering activity or an enterprise.

The potentially applicable section of the RICO statute provides that "[i]t is unlawful for any person employed by or associated with any enterprise to conduct or participate in the conduct of the affairs of the enterprise through racketeering activity or collection of an unlawful debt." Sec. 7-15-2 (setting forth prohibited RICO activities). To prove a RICO violation, the plaintiff must establish (1) the commission of one act of racketeering activity and (2) the use or investment of the proceeds of the racketeering activity in the establishment, conduct, or operation of an enterprise. State v. Brown, 486 A.2d 595, 599 (R.I. 1985); Nat'l Credit Union Admin. Bd. v. Regine, 795 F. Supp. 56, 70 (D. R.I. 1992). As defined by the statute, "'[r]acketeering activity' means any act or threat involving murder, kidnapping, gambling, arson in the first, second, or third degree, robbery, bribery, extortion, larceny, or prostitution, or any dealing in narcotic or dangerous drugs . . . ." Sec. 7-15-1. To constitute racketeering activity, the action should fall within this definition. See LaPorte v. LaPorte, 621 A.2d 186, 186 (R.I. 1993) (affirming willful concealment of marital assets from divorce proceeding does not constitute racketeering activity); Nat'l Credit Union Admin. Bd. v. Regine, 749 F. Supp. 401, 413 (D. R.I. 1990) (holding larceny an act of racketeering activity under R.I. law); see also Chain Store Maint., Inc. v. Nat'l Glass & Gate Serv., Inc., No. PB-01-3522, 2004 WL 877599, at *10

(R.I. Super. Apr. 21, 2004) (denying summary judgment where not provided evidence of racketeering activity enumerated in statutory definition).

Extortion, as set forth under Rhode Island law, is committed by:

> "Whoever, verbally or by a written or printed communication, maliciously threatens to accuse another of a crime or offense or by a verbal or written communication maliciously threatens any injury to the person, reputation, property, or financial condition of another, or threatens to engage in other criminal conduct with intent to extort money or any unlawful pecuniary advantage, or with intent to compel any person to do any act against his or her will, or to prohibit any person from carrying out a duty imposed by law . . . ." G.L. 1956 § 11-42-2.

More simply put, extortion is "(1) an oral or written threat to harm a person or property, (2) accompanied by the intent to compel someone to do something against his or her will." State v. Grayhurst, 852 A.2d 491, 515 (R.I. 2004); Nat'l Credit Union Admin. Bd., 795 F. Supp. at 68 ("consists of a verbal threat to injure the victim, accompanied by an intent to compel the victim to do an act against his or her will").

An "'[e]nterprise' includes any sole proprietorship, partnership, corporation, association, or other legal entity, and any union or group of individuals associated for a particular purpose although not a legal entity." Id.; Nat'l Credit Union Admin. Bd. 749 F. Supp. at 413 (determining plaintiff may be able to establish enterprise by group of individuals associated for a particular purpose under "broad terms of the statute"). The analogous federal RICO statute, sometimes relied upon by the courts of this state to construe "enterprise," differs in that it requires a "pattern of racketeering activity." See 18 U.S.C. § 1962(c); see also In re Giorgio, 62 B.R. 853, 865 (Bankr. D. R.I. 1986) (consulting federal interpretation of "enterprise" to apply to state RICO act). However, the "enterprise" and the "pattern of racketeering activity" are separate elements under federal law, and one does not necessarily constitute the other. United

States v. Cianci, 378 F.3d 71, 81-82 (1st Cir. 2004) (citing United States v. Turkette, 452 U.S. 576, 583 (1981)). Under the federal law:

> "actors who jointly engage in criminal conduct that amounts to a pattern of 'racketeering activity' do not automatically thereby constitute an association-in-fact RICO enterprise simply by virtue of having engaged in the conduct. Something more must be found—something that distinguishes RICO enterprises from ad hoc one-time criminal ventures." Cianci, 378 F.3d at 82.

To find an "enterprise," the First Circuit requires that "those associated in fact 'function as an ongoing unit' and constitute an 'ongoing organization.' Also important to such an enterprise is that its members share a common purpose."[24] Id. (citations omitted). Furthermore, the "enterprise must form an entity 'separate and apart' from the pattern of racketeering activity with which it is charged." Lares Group, II v. Tobin, 47 F. Supp. 2d 223, 229, (D. R.I. 1999); see Jenkins v. Mullen, No. 05-513ML, 2006 WL 909483, at *3 (D. R.I. 2006) (dismissing federal RICO claim where plaintiff failed to allege defendants functioned as ongoing unit separate and apart from the alleged pattern of activity). Lastly, to establish an enterprise for a federal RICO violation, the plaintiff must also show he or she was "harmed by reason of [the defendant's] use or investment of income derived from racketeering activity," or that he or she was "harmed by reason of [the defendants'] acquisition or maintenance of control of an enterprise through racketeering activity." Compagnie de Reassurance D'Ile de France v. New England Reinsurance Corp., 57 F.3d 56, 91 (1st Cir. 1995).

Cianci determined that "corporate entities, including municipal and county ones, can be included within association-in-fact RICO enterprises." 378 F.3d at 83. However, the court noted that the government would not have been able to prosecute the City itself or its agencies alone as

[24] The First Circuit, interpreting "enterprise" within the federal RICO statute, does not impose the "ascertainable structure" requirement mandated by other circuits. Cianci, 378 F.3d at 82.

the enterprise. Id. The focus in Cianci was on individuals, both inside and outside the city government. See id. at 77-88. The Cianci case held that there was sufficient evidence to support the jury finding of an enterprise because the defendants (both public and private officials) "comprised an ongoing organization that functioned as a continuing unit and was animated by common purposes or goals." Id. at 85.

In the matter at hand, there may be significant disputes of fact whether the State engaged in extortion by allegedly demanding Shire withdraw and forego bid opportunities or suffer financial harm, but it is not necessary for this court to address that argument. In addition to proving the racketeering activity (alleged to be extortion), Shire would have to prove "proceeds" from that activity invested in an enterprise. See Brown, 486 A.2d at 599. Shire has not come forth with competent evidence to prove either proceeds or an enterprise, and judgment should enter as a matter of law. See Hill, 11 A.3d at 113 (stating non-moving party must prove disputed facts by competent evidence rather than resting on pleadings or legal opinions and conclusions).

Throughout the prolific record produced by the parties, there is no evidence that proceeds of extortion were invested in an enterprise. See Brown, 486 A.2d at 599 (requiring use or investment of the proceeds of the racketeering activity in the establishment, conduct, or operation of an enterprise). Even if this Court were to believe that various employees of the State engaged in extortionate tactics with Shire, there is no evidence of proceeds resulting from those tactics or of the existence an enterprise. First, this Court has serious reservations finding that a group of only government employees may form an enterprise. See Cianci, 378 F.3d at 77-88 (finding enterprise of individuals inside and outside government, but not that city or its agencies alone could not constitute enterprise). Not only are all of the implicated individuals government employees, but there is also no allegation they were acting outside the scope of their

authority or in an individual capacity after the end of their state employment. Second, there is no evidence that the named Defendants function as an ongoing unit and constitute an ongoing organization separate and apart from the alleged extortionate activities here. See Turkette, 452 U.S. at 583; Cianci, 378 F.3d at 82. To establish its RICO claims, Shire alleges that government employees coerced Shire to forgeo and withdraw bids and refused awards, change orders, and payments, all in an effort to make Shire drop some of its claims on other projects. (2d Am. Compl. ¶¶ 223-26.) Unlike in Cianci where there were a number of different alleged instances of racketeering (separate schemes involving towing service contracts, real estate company city leases, jobs and sales in exchange for campaign contributions, etc.), here, there is no evidence of racketeering activity, if at all, towards anyone other than Shire. This can not constitute an ongoing effort separate and apart from the alleged extortion, as would have been necessary to establish an enterprise. Something must distinguish the alleged enterprise from a one-time conspiracy, and the Court does not see that here. See Cianci, 378 F.3d at 82 (requiring something that distinguishes RICO enterprises from ad hoc one-time criminal ventures). Accordingly, the Court grants summary judgment in favor of the Defendants on the RICO count.

3

Tortious Interference (Counts IV and V)

Shire brings Counts IV and V alleging tortious interference with contractual relations and tortious interference with prospective business relations, respectively. The State argues mainly that these claims fail because the State cannot interfere with its own contract or with business relations with itself.

Tortious interference with prospective business relations requires "(1) the existence of a business relationship or expectancy, (2) knowledge by the interferor of the relationship or

expectancy, (3) an intentional act of interference, (4) proof that the interference caused the harm sustained, and (5) damages to the plaintiff." L.A. Realty, 698 A.2d at 207 (quoting Mesolella, 508 A.2d at 669). For tortious interference with contractual relations, a plaintiff must show "(1) the existence of a contract, (2) the alleged wrongdoer's knowledge of the contract, (3) his [or her] intentional interference, and (4) damages resulting therefrom." Ims v. Town of Portsmouth, 32 A.3d 914, 925-26 (R.I. 2011); Smith Dev. Corp. v. Bilow Enters., Inc., 112 R.I. 203, 211, 308 A.2d 477, 482 (1973). The plaintiff need not prove malice or ill-will; an intent to do harm without justification will suffice. See Jolicoeur Furniture, 653 A.2d at 753 (citations omitted).

Generally, "[a] person must be a stranger to a contract to tortiously interfere with it." 44B Am. Jur. 2d Interference § 7 (2012). The Restatement provides that liability applies to "[o]ne who intentionally and improperly interferes with the performance of a contract . . . between another and a third person . . . ." Restatement (Second) Torts §§ 766, 766A (1979) (emphasis added); see Restatement (Second) Torts § 766B (1979) ("inducing or otherwise causing a third person not to enter into or continue the prospective relation . . ."). In particular, "[w]here the defendant is the entity the third party hires to administer, operate, or promote the event that forms the basis for the business relationship between the plaintiff and the third party, the defendant is no stranger to that relationship and cannot be held liable for interfering therewith." 44B Am. Jur. 2d Interference § 7 (2012) (citing Benefit Support, Inc. v. Hall Cnty., 637 S.E.2d 763, 769-70 (Ga. App. 2006)). As espoused by the Georgia courts:

> "[t]o sustain a claim for intentional interference with business relations, the tortfeasor must be an intermeddler acting improperly and without privilege. To be liable for tortious interference with business relations, one must be a stranger to the business relationship giving rise to and underpinning the contract. But, where a defendant had a legitimate interest in either the contract or a party to the contract, he is not a stranger to the contract itself or to the business relationship giving rise thereto and underpinning

> the contract. Nor does the fact that a defendant did not sign the contract preclude a finding that he was no stranger to the contract. In sum, all parties to an interwoven contractual arrangement are not liable for tortious interference with any of the contracts or business relationships. Moreover, the applicability of the "stranger doctrine" is the same for tortious interference with a business relationship as for tortious interference with a contractual relationship. For this reason, proof that the defendant was no stranger to the business relations at issue is fatal to the plaintiff's claim of tortious interference with business relations." Benefit Support, Inc., 637 S.E.2d at 769-70 (quoting Cox v. City of Atlanta, 596 S.E.2d 785, 788 (Ga. App. 2004)) (citations and emphasis omitted).

Rhode Island courts similarly follow this "stranger" or "outsider" requirement for tortious interference. See Local Dairymen's Coop. Ass'n, Inc. v. Potvin, 54 R.I. 430, 173 A. 535, 536 (1934) ("unquestioned that it is an actionable tort for an outsider to deliberately and maliciously interfere with the contractual relations of another"); Robertson Stephens, Inc. v. Chubb Corp., 473 F. Supp. 2d 265, 275 (D. R.I. 2007) (applying R.I. law in stating "well-settled that a party cannot tortiously interfere with its own contract"); URI Cogeneration Partners, LP v. Bd. of Governors for Higher Educ., 915 F. Supp. 1267, 1289 (D. R.I. 1996) (stating R.I. law "clear" that tortious interference applicable only to parties outside the agreement). One Rhode Island case, however, determined that the mayor and planning director of Woonsocket were third parties who could be liable for tortious interference with a contract between the City of Woonsocket and a company that had contracted to buy a parcel of land. See Jolicoeur Furniture, 653 A.2d at 752-53. Jolicoeur Furniture reasoned that because the city council, which passed the ordinance for the sale of the land, and the mayor's office were separate branches of the city government, they were independent enough to support a finding that the mayor and planning director tortiously interfered with the contact. See id.; see also URI Cogeneration Partners, 915 F. Supp. at 1289 (interpreting Jolicoeur as holding that only when defendants are "sufficiently separate . . . to be

third parties" may they be liable for tortious interference). It seems to this Court that in most cases, interference with a contract to which the interferor is or is essentially a party really amounts to breach of contract, and a claim for tortious interference is not actionable.

Here, both RIDOA and RIDOT are agencies of the executive branch of the Rhode Island state government. (2d Am. Compl. ¶¶ 16, 20.) RIDOA is the purchasing and contracting authority for the state, and thus, the signatory for all public works projects, including contracts and potential contracts with Shire. See id. at ¶ 19; see also § 37-2-12 (establishing Chief Purchasing Officer of RIDOA as procurement authority for contracts of state agencies). However, RIDOT is the agency responsible for the maintenance and construction of the subject of those projects—bridges and highways. (2d Am. Compl. ¶ 20.) The project plans, designs, and specifications that form the basis of the contracts are prepared by RIDOT and its contractors. Id. at ¶ 27. Once the contracts are awarded by RIDOA, RIDOT and its officials oversee the projects, handling all issues and change orders that may arise. Id. at ¶¶ 34-37. In fact, the projects are managed and monitored through RIDOT's PMP computer system. (Lemont Aff. 2, May 30, 2008.) When Shire has had claims on various projects, it has submitted them to RIDOT. See 2d Am. Compl. ¶¶ 53, 55 (regarding Point Street claims). RIDOT officials are apparently quite involved in the award of the contracts as well, requesting RIDOA to withhold or to award contracts to the low-bidder. See Pl.'s 6/10/11 Obj. Ex. F (Mem. from RIDOT to Stern, Jul. 25, 2005) (requesting RIDOA withhold award of I-95 Ramps project from Shire); Defs.' 12/16/10 Mem. Ex. E (Ltr. from RIDOT to Shire, Jun. 23, 2005) (declaring Shire low-bidder on Union Avenue); Najarian Dep. 61:1-64:20, Apr. 28, 2010 (acknowledging agreement between RIDOT, RIDOA, and FHWA to award Union Avenue but not Warren Bridge to Shire).

Shire brings the tortious interference claims against the Defendants named individually: Jerome Williams, Kazem Farhoumand, Frank Corrao III, Christos Xenophontos, Richard Fondi, and James Capaldi. See 2d Am. Compl. Counts IV-V. All are or were officials of RIDOT. Significantly, there is no allegation in the Complaint or in the submitted briefs that the individuals acted outside the scope of their authority or after their employment with the State ended. See id. at ¶¶ 233-44. The actions alleged are that the Defendants coerced Shire to withdraw bids, forego bid opportunities and claims, and the Defendants delayed change orders, payments, and awards to Shire. See id.

The plaintiff bringing a tortious interference claim must show that a defendant-employee is a third party from the employer because the defendant-employee exceeded his or her authority. See Finley v. Giacobbe, 79 F.3d 1285, 1295-96 (2d Cir. 1996); Richards v. Relentless, Inc., 341 F.3d 35, 43-44 (1st Cir. 2003) (citing Finley and holding insurer not stranger or third party when acting on behalf of contracting party). An employee acting within the scope of his or her authority is an agent of the employer, the principal, and therefore not a third party. See Robertson Stephens, Inc. v. Chubb Corp., 473 F. Supp. 2d 265, 275 (denying motion to dismiss where plaintiff alleges in complaint that party acted in own interest and not within scope of authority); see also Ed Peters Jewelry Co. v. C & J Jewelry Co., 124 F.3d 252, 275 (1st Cir. 1997) (stating corporate CEO would have to "act solely to advance his own personal interests" or not in "best interest" of the principal to not be an agent in context of tortious interference claim).

Just because the Defendants were named individually does not mean they are sufficiently separate under Rhode Island law to constitute third parties. See Jolicoeur Furniture, 653 A.2d at 752-53 (determining separate branches independent enough to be third parties); URI Cogeneration Partners, 915 F. Supp. at 1289 (interpreting Jolicoeur to require parties be

sufficiently separate). Here, Shire sets forth no evidence that Williams, Farhoumand, Carrao, Xenophontos, Fondi, or Capaldi acted outside their capacity as RIDOT employees dealing with public works contracts. Plaintiff has presented no evidence that the individual Defendants, or any of them, were independent enough to tortiously interfere with the contracts between Shire and the State so as to be deemed a third party. See Jolicoeur Furniture, 653 A.2d at 752 (determining third party when "not inconceivable that the separate branches would be independent enough to act in opposition to one another").

It is clear to this Court that RIDOA, the agency signing the contract, and RIDOT, the agency intensively involved in the contract process, and the individual employees are sufficiently interwoven such that RIDOT and its officials are not third persons or outside parties. See URI Cogeneration Partners, 915 F. Supp. at 1289 (holding clear that tortious interference applies only to outside parties); Benefit Support, 637 S.E.2d at 769-70. RIDOT and the individually-named defendants, at minimum, facilitate and administer the contract between Shire and RIDOA. See 44B Am. Jur. 2d Interference § 7 (2012) (explaining party who administers, operates, or promotes contract or business relationship between contracting parties cannot be liable for interfering with it). This is unlike Jolicoeur, which relied on the separation of the two government branches; here, all parties are agencies and individuals within the executive branch. See 653 A.2d at 752-53. RIDOT employees and RIDOA are not sufficiently separate for RIDOT to be outside of the agreements that RIDOT in fact was integral in effectuating. See Robertson Stephens, 473 F. Supp. 2d at 275 ("well-settled that a party cannot tortiously interfere with its own contract"). Therefore, this Court grants Defendants' motion for summary judgment on Counts IV and V.

4

Equitable Estoppel and Breach of Contract (Counts VII and VIII)

Shire brings claims for equitable estoppel (Count VII) and breach of contract (Count VIII) against the State. In support of its equitable estoppel claim, Shire claims that it was repeatedly assured by RIDOA that it would be awarded the Union Avenue contract, relied on those assertions, and did not receive the award. As to breach of contract, Shire claims it had a contractual right to the Union Avenue award through an implied-in-fact contract, and the State breached that contract. The State, oppositely, argues that summary judgment should be granted on the claims because regulations require an express written agreement and because an implied-in-fact contract should not be found.

Before discussing the applicable law of breach of contract and equitable estoppel, it is imperative to consider the competitive bidding process and the unique contours it provides to this Court's consideration of those claims. In addition to the statutes in Title 37, Chapter 2 of Rhode Island General Laws, the competitive bidding process on public works projects is governed by the State of Rhode Island Procurement Regulations (Procurement Regs.).[25] See § 37-2-13(e) ("The provisions of the state purchasing regulations promulgated as authorized herein shall be considered to be incorporated by operation of law in all state contracts"). The statutes and Purchasing Regs. vest power in only the Chief Purchasing Officer and Purchasing Agent to bind the State to a contract, and specifically, "[n]o purchase or contract shall be binding on the state or any agency thereof unless approved by the [RIDOA] or made under general regulations which the Chief Purchasing Officer may prescribe." Procurement Regs. 2.2.1.1, 8.2.1; see §§ 37-2-9, 37-2-11, 37-2-54. Various provisions of the statutes and bidding regulations establish that

[25] Procurement Regs. available at http://www2.sec.state.ri.us/dar/regdocs/released/pdf/DOA/5579.pdf.

enforceable public works contracts must be in writing. See § 37-2-49(b) (providing dispute procedure for party with "a lawfully authorized written contract"); Procurement Regs. 8.2.1.1.2, 8.2.1.2.1. The Procurement Regs. provide, in pertinent part:

> "No state agency official shall have the right (capacity) to exercise purchasing contract authority through written or oral agreements or contracts or, in any other way, financially or otherwise obligate the State without the express written consent of the Chief Purchasing Officer." Procurement Regs. 8.2.1.2.1.

In addition, oral agreements are not binding on the State, and the State may (but presumably does not have to) disregard them. Procurement Regs. 8.2.1.1.2. While the regulations require the express written consent of the Chief Purchasing Officer and that agreements shall not be oral, this Court is not aware of any regulation requiring a final, merged, written contract for State purchases or public works projects.

In general, equitable estoppel requires "first, an affirmative representation or equivalent conduct on the part of the person against whom the estoppel is claimed which is directed to another person for the purpose of inducing the other to act or fail to act in reliance thereon; and secondly, that such representation or conduct in fact did induce the other to act or fail to act to his injury." Providence Teachers Union v. Providence Sch. Bd., 689 A.2d 388, 391-92 (R.I. 1997). The "key element of an estoppel is intentionally induced prejudicial reliance." El Marocco Club, Inc. v. Richardson, 746 A.2d 1228, 1234 (R.I. 2000). Although equitable estoppel is generally not applied against a governmental agency, Rhode Island courts have "long recognized that the doctrine of estoppel may in appropriate circumstances be invoked against a public body." Ferrelli v. Dep't of Emp't Sec., 106 R.I. 588, 592-93, 261 A.2d 906, 909 (1970); see Lerner v. Gill, 463 A.2d 1352, 1363 (1983) ("In determining whether estoppel is an appropriate device to use against the government, we must not only consider the problems

encountered by the petitioner, but we must also be mindful of the public interest involved"); Schiavulli v. Sch. Comm. of N. Providence, 114 R.I. 443, 448-49, 334 A.2d 416, 419 (1975) ("estoppel may be invoked against a governmental agency when appropriate circumstances, justice, and right so require").

"[T]he doctrine of estoppel should be applied against public agencies to prevent injustice and fraud where the agencies or officers thereof, acting within their authority, made representations to cause the party seeking to invoke the doctrine either to act or refrain from acting in a particular manner to his detriment." West v. McDonald, 18 A.3d 526, 540 (R.I. 2011) (quoting Ferrelli, 106 R.I. at 594, 261 A.2d at 910). Courts have acknowledged, though, that estoppel against a government body "must be predicated upon the acts or conduct of its officers, agents or official bodies who are acting within the scope of their authority." Ferrelli, 106 R.I at 592-93, 261 A.2d at 909 (citations omitted); see Waterman v. Caprio, 983 A.2d 841, 846 (R.I. 2009) ("Court will not entertain an estoppel claim when a government employee's actions clearly are ultra vires"); Potter v. Crawford, 797 A.2d 489, 492 (R.I. 2002). In the major cases where estoppel is denied by the courts, the government actions relied upon are "ultra vires or in conflict with applicable law." See Romano v. Ret. Bd. of Emp.'s Ret. Sys. of R.I., 767 A.2d 35, 38 (R.I. 2001) (denying estoppel created by employee's statement that retiree could collect pension while working new state job when this double-dipping clearly barred by state law); see also Waterman, 983 A.2d at 847 (denying estoppel claim when employee lacked actual or implied authority to make binding statement); Tech. Investors v. Town of Westerly, 689 A.2d 1060, 1062 (R.I. 1997) (denying estoppel when to grant it would contravene state law and be "clearly ultra vires"). Yet, the concept still may be properly "invoked against public agencies to

prevent injustice and fraud" based on "a consideration of all the circumstances in the case." Id. at 593, 261 A.2d at 909.

Separately, it appears this jurisdiction has never found an implied-in-fact contract between the State and a contractor. Rhode Island has considered implied-in-fact contracts in other scenarios, however. The "essential elements of contracts 'implied in fact' are mutual agreement, and intent to promise, but the agreement and the promise have not been made in words and are implied from the facts." Bailey v. West, 105 R.I. 61, 64-65, 249 A.2d 414, 416 (1969). The contractual obligation is created by the "intention of the parties." Id. at 65, 249 A.2d at 416.

An implied-in-fact contract is "a form of express contract wherein the elements of the contract are found in and determined from the relations of, and the communications between the parties, rather than from a single clearly expressed written document." Marshall Contractors, Inc. v. Brown Univ., 692 A.2d 665, 669 (R.I. 1997). "The difference between an express contract and an implied-in-fact contract is simply the manner by which the parties express their mutual assent." Id. (citing A & B Constr., Inc. v. Atlas Roofing & Skylight Co., 867 F. Supp. 100, 108 (D. R.I. 1994)). Even where there is a statutory or regulatory requirement that a public contract be in writing, implied-in-fact contracts with the government may be enforced. See PacOrd, Inc. v. United States, 139 F.3d 1320, 1322 (9th Cir. 1998); Narva Harris Constr. Corp. v. United States, 574 F.2d 508, 510-11 (Ct. Cl. 1978). However, a court should be hesitant to find an implied-in-fact contract when the communications "point only to an ongoing contract negotiation process aimed at eventually defining what the scope of the project . . . would include," particularly when the scope "constituted the very heart and vital essence of their

ongoing contract negotiations and prevented the emergence and existence of any implied in fact contract." Marshall Contractors, 692 A.2d at 669.

"[T]he resolution of a dispute concerning if and when contract negotiations materialize into a mutual understanding and resulting binding contract is ordinarily a question of fact for the factfinder." Id. at 670. Only when "the record evidence unerringly points only to the conclusion that the parties never did mutually agree" does the implied-in-fact contract status become a question of law. Id. at 670-71 (denying existence of implied-in-fact contract where parties never reached mutual understanding on scope of work or cost of project).

The evidence in the record of assertions made and writings signed by the Chief Purchasing Officer, Najarian, and Purchasing Agent, Stern, could, judging in the light most favorable to Shire, the non-moving party, be sufficient for a reasonable factfinder to apply equitable estoppel or find a contract implied-in-fact. Because Shire's claims for equitable estoppel and breach of contract relate to the solicitation and award of Union Avenue, the Purchasing Act presumption of correctness standard will apply to this analysis. See § 37-2-51. The relevant facts are significantly contested and outlined below.

On June 10, 2005, bids were opened on the Union Avenue project, and Shire was determined to be the low-bidder. 2d Am. Compl. ¶ 87; Donatelli Aff. ¶¶ 5-6, Dec. 16, 2009. RIDOT in fact contacted Shire in writing, notifying it that it was the apparent low-bidder on the project. (Defs.' 12/16/10 Mem. Ex. E (Ltr. from Xenophontos to Shire, Jun. 23, 2005).) An award of the contract did not immediately follow. (Donatelli Aff. ¶ 8, Dec. 16, 2009.) Najarian and Stern, however, allegedly directed Shire in October 2005 not to submit a bid on the Warren Bridge project in order to alleviate any political concerns surrounding the Barrington Bridge issues and to ensure the award of the Union Avenue contract to Shire. Id.; T. Gammino Aff. ¶10,

Jun. 10, 2011; Donatelli Aff. ¶¶ 11-13, Dec. 16, 2009; T. Gammino Dep. 88:3-90:23, Aug. 3, 2010. According to Gammino, Stern reiterated to him that if Shire did not bid on Warren Bridge, it would get the contract for Union Avenue. (T. Gammino Dep. 90:1-9, Aug. 3, 2010.)

Najarian, however, acknowledges that there were some conversations regarding the difficulty of awarding projects to Shire immediately after the Point Street Settlement Agreement, but claims she does not recall any specific discussion that Shire would not receive some contracts but would receive Union Avenue. (Najarian Dep. 46:9-47:11, Apr. 28, 2010.) Najarian explained the conversation between Shire and RIDOA as a realistic assessment but not a promise that Shire would receive Union Avenue if it did not bid on Warren Bridge. (Najarian Dep. 61:1-64:20, Apr. 28, 2010.) She admits, though, that RIDOA, RIDOT, and FHWA unanimously agreed to give Union Avenue to Shire and to insure Warren Avenue would not be awarded to Shire. Id. On November 10, 2005, Najarian wrote to FHWA, stating "I thought we had . . . unanimously decided to give the bid to Shire . . . ." Pl.'s 6/10/11 Obj. 11, Ex. G (Email from Najarian to Galiauskas, Nov. 10, 2005) (noting prior unanimous agreement to give Shire Union Avenue and insure Warren Bridge would not be awarded to Shire).

There were apparently several meetings between Shire and RIDOA officials in late 2005. 2d Am. Compl. ¶¶ 90-91; Donatelli Aff. ¶ 9, Dec. 16, 2009. Stern informed Shire that the delay in awarding Union Avenue was because of funding issues and told Shire that the contract would be awarded to it when funding was secured. 2d Am. Compl. ¶ 92; T. Gammino Aff. ¶¶ 5-6, Jun. 10, 2011; Donatelli Aff. ¶ 15, Dec. 16, 2009. Stern testified he was holding the bid open for Shire. (Brian Stern Dep. 268:6-13, Nov. 8, 2011.) In exchange, Shire agreed to hold the bid price on Union Avenue for a reasonable length of time, allegedly due to the pressure on its

revenue from the Barrington Bridge issues, "coerced bid withdrawals," and "forgone bid opportunities under duress." 2d Am. Compl. ¶ 93; Donatelli Aff. ¶ 16, Dec. 16, 2009.

Shire claims it relied on Purchasing Agent Stern's promise of the Union Avenue award to Shire. (T. Gammino Aff. ¶¶ 7-8, Jun. 10, 2011.) Stern was aware that in 2006 the current owners of Shire were considering a purchase of the company, and the Union Avenue contract was an integral consideration in that purchase. Pl.'s 6/10/11 Obj. 12; T. Gammino Aff. ¶¶ 8-9, Jun. 10, 2011. Mr. and Mrs. Gammino assert that they made the purchase in reliance on Stern's promise that Shire would be awarded Union Avenue as soon as federal funding was available. T. Gammino Aff. ¶¶ 8-9, Jun. 10, 2011; Donatelli Aff. ¶ 27, Dec. 16, 2009. The delay of the Union Avenue award had serious cash flow consequences for Shire. (T. Gammino Aff. ¶ 9, Jun. 10, 2011.)

The State maintains that the award of Union Avenue could not move forward without FHWA concurrence. See Defs.' 12/16/10 Mem. 10; Lucy Garliauskas Decl. ¶ 3, Sep. 19, 2011. Stern understood federal financing to be a "condititon precedent" to the State's award of Union Avenue. (Stern Aff. ¶ 51, Dec. 14, 2011.) Shire maintains that federal funding was not a prerequisite listed in the bidding materials, but Shire acknowledges elsewhere that the award of contracts at least typically requires federal concurrence because of the use of federal funds. See Pl.'s 6/10/11 Obj. 2-3; T. Gammino Dep. 79:7-80:1, Aug. 3, 2010. In addition to the funding issues mentioned by Stern as delaying the Union Avenue award, set backs on a Cranston Street Railroad Bridge Project (Cranston Street) may have also contributed to the lack of a timely award.[26] (Defs.' 12/16/10 Mem. 9.)

[26] According to the RIDOT's Chief Engineer at that time, both the Cranston Street and Union Avenue projects were to utilize the same detour route. Id. at Ex. F (Ltr. from Parker to Xenophontos, Sep. 14, 2005). Because the Cranston Street project was behind schedule and still

FHWA, according to the November 11, 2005 communication and an affidavit submitted by Peter Osborn (the current Division Administrator), did not concur in the award of Union Avenue to Shire. 2d Am. Compl. Ex. C (Mem. from FHWA to RIDOA, Nov. 11, 2005); Peter Osborn Aff. ¶ 7, Nov. 23, 2010. Shire claims, on the contrary, that FHWA concurred in the award and notified RIDOT of that concurrence in a just prior, November 1, 2005 letter from FHWA to RIDOT. (Pl.'s 3/18/11 Obj. Ex. T (Ltr. from FHWA to RIDOT, Nov. 1, 2005).)[27] However, both Osborn and Lucy Garliauskas, the prior Division Administrator, testify in their affidavits that letter was a draft that was never finalized or sent out to RIDOT. Osborn Aff. ¶ 3, 6, Nov. 23, 2010; Garliauskas Decl. ¶ 6, Sep. 19, 2011. Shire also claims and provides some evidence that the federal funding for the Union Avenue project was available in 2005, but according to Shire the award of the Union Avenue contract was not expressly contingent on federal concurrence or federal funding anyway. 2d Am. Compl. ¶¶ 94, 96, Ex. C (Ltr. from RIDOT to FHWA, Dec. 21, 2005) (requesting permission from FHWA for RIDOT to redirect $2 million of Union Avenue funds to another project); Donatelli Aff. ¶¶ 17-18, Dec. 16, 2009. Whether federal funding is a condition precedent to the award of Union Avenue to Shire and whether federal funding was provided or made available are both serious disputes of material facts.

On March 21, 2006, Stern wrote an email to RIDOT refusing to cancel the Union Avenue bid. (2d Am. Compl. Ex. D (Ltr. from Stern to Xenophontos, Mar. 21, 2006).) According to Stern, Najarian had also instructed RIDOT not to cancel the bids. (Stern Dep. 308:12-14, Nov.

---

ongoing, over-lapping detours of the two projects could have caused substantial risk and significant cost escalation according to the engineer, who recommended not awarding the Union Avenue contract at the time. Id.

[27] The Court notes that in its copy of the Plaintiff's 3/16/11 Objection and the supporting exhibits, the letter provided as Exhibit T is only the first page, conspicuously missing the remainder and any signature.

8, 2011.) As of April 2006, Stern, according to his own testimony, was still holding the bid for Shire. (Stern Dep. 310:7-9, 312:4-6, Nov. 8, 2011.) In a December 8, 2006 email, Stern wrote that Union Avenue was a "tentative award." (Pl.'s 6/10/11 Obj. Ex. X (Email from Stern to Hynes, Dec. 8, 2006).)

Sometime during late 2006 or early 2007, portions of the Union Avenue contract were re-let for bid by RIDOT under the High Hazard[28] contract. When Shire informed Stern that portions were included in this new project, Stern told RIDOT that Union Avenue was still on hold and instructed that the High Hazard bids be cancelled. 2d Am. Compl. ¶ 114, Ex. F (Email from Stern to RIDOT, Nov. 14, 2006; Email from Stern to Hynes, Nov. 16, 2006); Donatelli Aff. ¶¶ 25-26, Dec. 16, 2009. Stern testified that he cancelled High Hazard because Union Avenue was still being held open for Shire. (Stern Dep. 319:17-320:12, Nov. 8, 2011.) In March 2007, based on a discussion with Stern, Shire returned its bid surety for Union Avenue to RIDOA, again because the contract was still being held for it. (2d Am. Compl. Ex. E (Ltr. from Shire to RIDOA, Mar. 15, 2007).)

Shire never received the required notice that Union Avenue bids were rejected. 2d Am. Compl. ¶¶ 130-31; Donatelli Aff. ¶ 20, Dec. 16, 2009. In fact, the Chief Purchasing Officer never approved cancellation or rejection of bids on the Union Avenue project. (2d Am. Compl. ¶ 132, Ex. G (Ltr. from RIDOA to FHWA, Mar. 18, 2008).) RIDOA felt it in the best interest of the State to award the contract to Shire and continued seeking federal concurrence in the award. Pl.'s 6/10/11 Obj. Ex. K (Ltr. from RIDOA to FHWA, Mar. 18, 2008); Stern Aff., Dec. 14, 2011, Exs. 20 (Ltr. from RIDOA to FHWA, Mar. 28, 2008), 21 (Ltr. from FHWA to RIDOA, Apr. 1, 2008). It was not until May 16, 2008, that Shire learned from RIDOT that Shire may not be

[28] Contract # 2007-CT-005, Safety Improvements to High Hazard Intersections

awarded the Union Avenue contract despite the prior assurances from the Chief Purchasing Officer and Purchasing Agent. (2d Am. Compl. ¶ 133.) Gammino called Stern, who suggested Shire send a demand letter. (T. Gammino Dep. 99:10-15, Aug. 3, 2010.)

As a result of the conflicting facts in the record, as demonstrated above, this Court cannot enter judgment as a matter of law on Counts VII or VIII. See Shelter Harbor Conservation Soc'y, 21 A.3d at 343 (stating summary judgment improper where record evinces genuine issue of material fact). There are significant disputes regarding, without limit, whether Najarian and/or Stern assented to the award of Union Avenue to Shire, whether federal funding was a condition precedent of any agreement between the State and Shire, and if so, whether that condition occurred. Furthermore, it is a question of fact, not law, whether the writings and representations between the Chief Purchasing Officer, Purchasing Agent, and Shire amount to an implied-in-fact contract. See Marshall Contractors, 692 A.2d at 670-71 (stating existence of implied-in-fact contract typically a question of fact for the factfinder).

The decisions of the State are afforded a presumption of correctness, but will be disturbed by the courts if a palpable abuse of discretion or procured by bad faith or corruption. See Trukaway, 643 A.2d at 816 (applying presumption of correctness in absence of bad faith or corruption). Here, there are indications—and, certainly, claims made by Shire—of bad faith or corruption, but those facts are also disputed, as demonstrated above. Accordingly, this Court cannot determine on summary judgment that there was no palpable abuse of discretion or that there was no bad faith or corruption involved in the decisions surrounding the Union Avenue bid solicitation and that the State's decisions should be presumed correct.

Because of the disputes of fact, a reasonable jury could find either equitable estoppel or an implied-in-fact contract may exist in this case. The significant issues of material fact

presented by the disputed evidence preclude this Court from ruling in favor of the Defendants at the summary judgment stage. Accordingly, the Court denies Defendants' motion for summary judgment on Counts VII and VIII, setting forth above some of the reasons for the denial.

5

Declaratory and Injunctive Relief (Counts IX and X)

Shire requests declaratory and injunctive relief with regard to the validity and enforceability of the RIDOT Standard Specifications for Road and Bridge Construction (Bluebook) Section 100.[29] Though not extensively briefed by either party, on summary judgment the State argues the Bluebook issue is moot and Shire does not have standing or jurisdiction in this Court to raise its claim of damages.

The portions of the Bluebook primarily at issue regard disqualifications of bid proposals. See Bluebook § 102.07 (now Procurement Regs. 12.102.07). For example, the regulations provide that proposals are non-responsive if they do not use certain RIDOT forms and software, if a compact disc (CD) is not submitted, or if the proposal is received after the time designated. See id. The Purchasing Act provides that the Procurement Regs. must be "promulgated by the chief purchasing officer in accordance with any applicable provisions" of Title 37, Chapter 2 and Title 42, Chapter 35. Sec. 37-2-13(b). Shire claims that the old Bluebook regulations were not appropriately adopted by the Chief Purchasing Officer. (2d Am. Compl. ¶ 305.)

However, the Bluebook regulations at issue have now been appropriately adopted and incorporated into the Procurement Regs. See Procurement Regs. § 12. Shire's only tenable claims, as acknowledged at oral argument, relate to the Bluebook prior to its due adoption. (Tr.

[29] Bluebook Section 100 no longer exists in the RIDOT specifications and has been made a part of the RIDOA Procurement Regs. in Section 12. Procurement Regs. § 12 available at http://www.purchasing.ri.gov/RIVIP/publicdocuments/RULES2011/SEC12.pdf.

116:22-23, Jan. 5, 2012.) The current version of the Procurement Regs., which includes the former Bluebook sections, was adopted June 20, 2011. See Procurement Regs.[30] Even if at one time the Bluebook sections were not properly adopted, the State points out that they were incorporated into the construction contracts. (Defs.' 12/16/10 Mem. 75.) Now, since the regulations have been properly enacted, effectively none of Shire's contracts subject to the old Bluebook sections are still ongoing. See Tr. 114:3-23, Jan. 5, 2012.

As previously noted, the UDJA endows this Court with the "power to declare rights, status, and other legal relations . . . ." Sec. 9-30-1. However, there must be a justiciable case or controversy providing standing to the plaintiff. N & M Props., LLC v. Town of West Warwick, 964 A.2d 1141, 1144-45 (R.I. 2009); Meyer v. City of Newport, 844 A.2d 148, 151 (R.I. 2004) ("necessary predicate to a court's exercise of its jurisdiction under the [UDJA] is an actual justiciable controversy"). To have standing under the UDJA, the plaintiff must suffer an injury in fact, meaning a concrete and particularized interest and actual or imminent injury to it. See N & M Props., 964 A.2d at 1145 (citations omitted). Further, there must be a legal hypothesis entitling the plaintiff to real and articulable relief. See id. (citations omitted).

The UDJA does not provide jurisdiction where there is no standing; thus, courts will "only consider cases involving issues in dispute" and will not "address moot, abstract, academic, or hypothetical questions." Arnold v. Lebel, 941 A.2d 813, 818-19 (R.I. 2007). The principle of mootness is applicable in actions for equitable relief, and declaratory judgment will not be rendered on moot questions. See Town of Scituate v. Scituate Teachers' Ass'n, 110 R.I. 679, 684, 296 A.2d 466, 469 (1972). A case is moot if there is no ongoing stake in the controversy or the court's judgment would fail to have any practical effect on the controversy. See Lynch v.

[30] The State first attempted to remedy this situation through an emergency APA procedure, but has since adopted the Bluebook through the full process.

R.I. Dep't of Envtl. Mgmt., 994 A.2d 64, 71 (R.I. 2010); H.V. Collins Co. v. Williams, 990 A.2d 845, 848 (R.I. 2010).

Here, because the Bluebook has now been properly adopted by the Chief Purchasing Officer and incorporated into the Procurement Regs., Shire's request that this Court declare section 100 of the old Bluebook void and enjoin the State from enforcing it is moot. Without the improper regulations remaining in effect and without evidence of ongoing projects affected by the old regulations, this Court finds no ongoing controversy in which Shire would have an articulable stake. See H.V. Collins, 990 A.2d at 848 (requiring articulable stake in outcome). Granting Shire its requested relief would not have any significant effect. See Lynch, 994 A.2d at 71 (explaining question moot if judgment would have no practical effect on controversy).

Further, to the extent there may be any ongoing projects creating controversies under the old, improperly-adopted version of the Bluebook, this Court is satisfied that the provisions were incorporated in the construction contracts and that Shire (and presumably other contractors) had followed the old provisions for quite some time. Prior to this cause of action, Shire abided by the very requirements it now claims were ineffective on numerous public works bids and projects. Moreover, there is no competent evidence in the record to prove the existence of a justiciable case or controversy under the old Bluebook on which Shire requests declaratory and injunctive relief. See Hill, 11 A.3d at 113 (requiring non-moving party prove existence of disputed facts by competent evidence); Meyer, 884 A.2d at 151 (requiring justiciable case or controversy and standing under UDJA). Therefore, the Court grants Defendants' motion for summary judgment on the Bluebook claims in Counts IX and X.

IV

Conclusion

After due consideration, this Court grants in part and denies in part Defendants' Motion for Summary Judgment. The Court grants summary judgment in favor of the Defendants on Counts III (Abuse of Process) and VI (Civil Conspiracy) pursuant to the Rhode Island Anti-Slapp statute. The Court further grants summary judgment in favor of the Defendants on the substantive due process and equal protection claims in Count I, determining there are no protected liberty or property interests at stake and Shire failed to establish the State met the standard for malicious or bad faith intent to injure. Summary judgment on Count II (RICO) is granted on the basis that there is no enterprise within the meaning of the statute. Summary judgment is also granted on the tortious interference claims of Counts IV and V because RIDOT and the individually-named Defendants are not outsiders and cannot interfere with what is essentially their own contract. The Court denies summary judgment on Counts VII and VIII for equitable estoppel and breach of contract due to significant disputes of material fact that must be left to the factfinder. Finally, summary judgment is granted on Counts IX and X with respect to the Bluebook claims, which this Court finds to be moot.

Defense counsel may present an Order consistent herewith which shall be settled after due notice to counsel of record and an opportunity to be heard.