Johnson Bros. v. City of Charlotte, 2024 NCBC 11.

STATE OF NORTH CAROLINA MECKLENBURG COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS00 2076-590
JOHNSON BROS. CORPORATION, A SOUTHLAND COMPANY, Plaintiff, v. CITY OF CHARLOTTE, Defendant.	**ORDER AND OPINION ON DEFENDANT CITY OF CHARLOTTE'S MOTIONS TO DISMISS**
JOHNSON BROS. CORPORATION, A SOUTHLAND COMPANY, Third-Party Plaintiff, v. URS CORPORATION, Third-Party Defendant.	

1. **THIS MATTER** is before the Court on Defendant City of Charlotte's Motions to Dismiss Plaintiff's Claims (the "Motion") under Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure (the "Rules") in the above-captioned case.[1]

2. This case involves a dispute between Johnson Brothers Corporation, a Southland Company ("JBC"), which served as the general contractor on the City of Charlotte's (the "City") CityLYNX Gold Line Streetcar extension project (the "Project"), and the City over the City's alleged breaches of the parties' contract for

[1] (Def. City Charlotte's Mots. Dismiss, Answer First Am. Verified Compl., and Countercl. [hereinafter, the "Mots."], ECF No. 3.)

construction of the Project. The City denies all liability and seeks to dismiss JBC's claims on grounds that those claims are barred by sovereign immunity and by the applicable statute of limitations.

3. Having considered the Motion, the materials submitted in support of and in opposition to the Motion, the arguments of counsel at the hearing on the Motion, and other appropriate matters of the record, the Court hereby **GRANTS** in part and **DENIES in part** the Motion as set forth below.

Cokinos Young, by John P. DiBiasi and Branson Rogers, and Windle Terry Bimbo, by Steele B. Windle, III, for Plaintiff Johnson Bros. Corporation, a Southland Company.

Hamilton Stephens Steele + Martin, PLLC, by Rebecca K. Cheney, Bentford E. Martin, and Graham B. Morgan, for Defendant City of Charlotte.

Bledsoe, Chief Judge.

I.

FACTUAL BACKGROUND

4. The Court recites the allegations asserted and the documents referenced in the Amended Complaint that are relevant to the Court's determination of the Motion.

5. JBC is a Texas corporation with its principal place of business in Grapevine, Texas.[2] The City is a local government existing under the laws of the State of North Carolina.[3]

[2] (First. Am. Verified Compl. [hereinafter, "Am. Compl."] ¶ 1, ECF No. 2.)

[3] (Am. Compl. ¶ 2.)

6. In October 2016, the City solicited contractors to submit competitive bid proposals for the construction of the Project and published plans and specifications for contractors to rely upon in preparing their bids.[4] JBC submitted a bid proposal to the City and was selected as the Project's general contractor on 28 November 2016.[5] Thereafter, the City and JBC entered into a contract for construction of the Project (the "Contract"), and JBC began work on the Project after the City issued a Notice to Proceed on 27 February 2017.[6] The Contract included a provision adopting a mandatory mediation process (the "Mediation Process") and providing that full compliance with the Mediation Process was a precondition to initiating litigation concerning a dispute arising under the Contract.[7] The Contract incorporated plans and specifications that provided the sequence of construction and the scope of work for the Project, including the traffic control measures the contractor could expect (the "Plans and Specifications").[8]

7. The Contract also incorporated portions of the 2012 North Carolina Department of Transportation's Standard Specifications for Roads and Structures (the "SSRS").[9] The SSRS is a compilation of standard requirements used by the

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[4] (Am. Compl. ¶ 6.)

[5] (Am. Compl. ¶¶ 7–9.)

[6] (Am. Compl. ¶¶ 7–9, 19.)

[7] (Index Exs. Filed Supp. Def. City Charlotte's Mots. Ex. 1, Standard Special Provisions Article 2.32 [hereinafter, the "Contract"], ECF Nos. 26.1, 26.2, 26.3.)

[8] (Am. Compl. ¶¶ 10, 15.)

[9] (Am. Compl. ¶ 12; Contract 79–81.)

North Carolina Department of Transportation for construction contracts.[10] At issue here are the SSRS procedures through which a contractor may seek additional compensation under the Contract.

8. The SSRS defines "extra work" as "work found necessary or desirable to fully complete the work as contemplated in the contract for which payment is not provided for by the contract unit or lump sum prices in the original contract."[11]

9. Section 104-7 of the SSRS sets forth the procedure the contractor must follow to be compensated for "extra work":

> When the Contractor is required to perform work that is, in his opinion, extra work, he shall notify the Engineer in writing before performing such work. The Engineer will investigate and, based upon his determination, one of the following will occur.
>
> > **(A)** If the Engineer determines that the affected work is extra work, the Contractor will be notified in writing by the Engineer and compensation will be made in accordance with [Section] 104-8(A).
> >
> > **(B)** If the Engineer determines that the work is not extra work, he will notify the Contractor in writing of his determination. If the Contractor upon receipt of the Engineer's written determination intends to file a claim for additional compensation by reason of such work, he shall notify the Engineer in writing of such intent before beginning any of the alleged extra work and in conformance with [Section] 104-8(B).
>
> Work performed without prior written consent of the Engineer will be considered incidental to the work of the contract.[12]

[10] (Index Exs. Filed Supp. Def. City Charlotte's Mots. Dismiss Ex. 10 [hereinafter, "SSRS"], ECF No. 26.12.)

[11] (SSRS Section 101.)

[12] (SSRS Section 104-7.)

10. In relevant part, SSRS Section 104-8 provides that when the City's engineer has determined that the disputed work is not "extra work" and the contractor has submitted a notice of intent to file a claim for additional compensation under Section 104-7, the work is "force account work."[13] Section 109-4 sets forth specific documentation procedures the contractor must follow in submitting records of force account work (together with the procedures enumerated in Section 104-8, the "Notice and Documentation Requirements").[14]

11. Section 104-3 delineates a similar procedure for contractors to follow in the event that the City's engineer directs an "alteration in the plans or details of construction that materially changes the character of the work and the cost of performing the work." The Notice and Documentation Requirements apply to claims made under Section 104-3 as well.[15]

12. The SSRS also provides in Section 104-2 that the City may enter into supplemental agreements with the contractor when it is necessary to make amendments to satisfactorily complete the proposed construction or to provide authorized time extensions.[16]

13. Finally, the SSRS provides the contractor a right to file a verified claim:

> If the Contractor fails to receive such settlement as he claims to be entitled to under the terms and provisions of the contract, the

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[13] (SSRS Section 104-8(B).)

[14] (SSRS Section 109-4.)

[15] (SSRS Sections 104-3, 104-8, 109-4.)

[16] (SSRS Section 104-2.)

> Contractor may submit a written and verified claim for such amounts he deems himself or his subcontractor entitled to under the terms and provisions of the contract provided he has complied with the applicable provisions of the contract including, but not limited to, giving written notice of intent to file a claim, keeping and submission of cost records and the initial submission of a written claim within the specified time period.[17]

14. JBC alleges that from almost the outset of the Project, the City made major changes to the contracted scope of work that had been set forth, at least in part, by the Plans and Specifications, including changes to traffic control plans, unanticipated restrictions and limitations on JBC's working hours, conflicts with other contractors, and unexpected requirements for constructing new storm drain structures, as opposed to planned pre-cast drain structures.[18]

15. In February 2018, the City notified JBC that it believed JBC's progress on the Project was unsatisfactory and threatened to assess liquidated damages.[19] In response, JBC sent a letter to the City in March 2018 asserting that the delays to the Project were the result of factors caused by the City which prevented JBC from completing the work within the anticipated time frame set forth in the Plans and Specifications (the "March 2018 Letter").[20] These factors included (i) the City's failure to timely obtain encroachment agreements, (ii) the City's changes to traffic control plans, (iii) the City's delayed submittals for precast concrete structures and

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[17] (SSRS Section 107-24.)

[18] (Am. Compl ¶¶ 20–38.)

[19] (Am. Compl. ¶ 39.)

[20] (Index Exs. Filed Supp. Def. City Charlotte's Mots. Dismiss Ex. 2, ECF No. 26.4; Pl.'s Br. Opp'n City's Mots. Dismiss Ex. 4, ECF No. 36.)

the inability to use precast concrete structures, (iv) the City's changes to the storm drain system on Hawthorne Lane, and (v) a gas line conflict at the intersection of 7th Street and Hawthorne Lane.[21] The City responded to the March 2018 letter in August 2018, advising that "no time extension [could] be determined at [that] time."[22] In October 2018, JBC and the City exchanged letters again—JBC's letter reiterating that the City-imposed factors had caused JBC's delay and the City's letter complaining that JBC's progress on the Project was unsatisfactory.[23]

16. JBC and the City exchanged many letters of a similar nature after October 2018, including until well after the Project was opened for public use on 30 August 2021 (at least until November 2021).[24] Despite the parties' disagreements, they did not enter into a supplemental agreement or engage in the Mediation Process under the Contract during this time.

17. JBC submitted the first official claim letter on 30 September 2020 (the "September 2020 Claim Letter").[25] In that letter, JBC sought to "initiate discussions

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[21] (Index Exs. Filed Supp. Def. City Charlotte's Mots. Dismiss Ex. 2.)

[22] (Pl.'s Br. Opp'n City's Mots. Dismiss Ex. 5, ECF No. 37.)

[23] (Pl.'s Br. Opp'n City's Mots. Dismiss Ex. 6, 7, ECF Nos. 38, 39; Index Exs. Filed Supp. Def. City Charlotte's Mots. Dismiss Ex. 4, ECF No. 26.6.)

[24] (Am. Compl. ¶¶ 46–59; Pl.'s Br. Opp'n City's Mot. Dismiss Exs. 10, 23–24, 26–27, ECF Nos. 42, 55–56, 58–59; Index Exs. Filed Supp. Def. City Charlotte's Mots. Dismiss Ex. 5, ECF No. 26.7.)

[25] (Index Exs. Filed Supp. Def. City Charlotte's Mots. Dismiss Ex. 7 [hereinafter, the "September 2020 Claim Letter"], ECF No. 26.9; Pl.'s Br. Opp'n City's Mots. Dismiss Ex. 21, ECF No. 53.)

that [would] allow JBC and the City to resolve all outstanding commercial issues."[26] To this end, JBC listed nine "disruptions" that it claimed impacted the nature and character of the work and resulted in delays, which it titled: (i) "Extra-Contractual Traffic Control & Workhour Restrictions," (ii) "Conflicts with Existing Utilities," (iii) "Interference by Other Contractors—New Construction," (iv) "Brick Built Boxes vs. Pre-Cast Storm Drain Structures," (v) "Design Changes/Plan Revisions," (vi) "Hawthorne Bridge—Abutment Beam Seat Elevation Discrepancies," (vii) "Hawthorne Bridge—Deck Elevation," (viii) "Extra-Contractual Submittal Requirements and Extended Review/Approval," and (ix) "COVID-19, Social Justice Protests, and Weather."[27]

18. JBC submitted another claim letter on 1 March 2021. This letter updated the September 2020 Claim letter based on the status of the Project as of February 2021.[28] Eight months later, on 2 November 2021, JBC submitted a Preliminary Verified Claim and requested to begin the Mediation Process provided by the Contract.[29]

19. Although the City opened the Project for public use on 30 August 2021, the City declined to certify substantial or final completion of the Project at that time and instead issued lists identifying additional work JBC was to complete, including

[26] (September 2020 Claim Letter.)

[27] (September 2020 Claim Letter.)

[28] (Pl.'s Br. Opp'n City's Mots. Dismiss Ex. 23.)

[29] (Am. Compl. ¶ 56; Pl.'s Br. Opp'n City's Mots. Dismiss Ex. 27.)

maintenance "punch lists."[30] JBC claims that it completed most of these "punch list" items, but the City notified JBC on 4 April 2023 that it considered JBC to be in default for failure to complete all of the items by the Contract's completion date.[31]

20. Almost all of the nearly 70 pay applications JBC submitted for Project work were paid late, some remaining unpaid until at least January 2023.[32] JBC and the City completed a mediation concerning JBC's claims but reached an impasse on 27 January 2023.[33]

II.

PROCEDURAL BACKGROUND

21. On 31 January 2023, JBC initiated this action by requesting and obtaining the issuance of a summons and permission from the Court to file its complaint within 20 days thereafter under Rule 3(a).[34] JBC then timely filed its original Complaint on 20 February 2023[35] and thereafter filed its First Amended Complaint ("Amended

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[30] (Am. Compl. ¶ 59.) At the Hearing, JBC's counsel represented that for purposes of the Motion, JBC agreed that "substantial completion" occurred on 31 August 2021. (*See* November 2, 2023 Hr'g Tr. 83:13–15 [hereinafter "Tr."], ECF No. 88) ("But for purposes of the analysis, Your Honor, we will agree for this analysis substantial completion in that term occurred on August 31, 2021.").

[31] (Am. Compl. ¶ 62.)

[32] (Am. Compl. ¶ 58.)

[33] (Pl.'s Br. Opp'n City's Mots. Dismiss Exs. 29, 30, ECF Nos. 61, 62.)

[34] (Application and Order Extending Time File Compl., ECF No. 9); *see also* N.C.R. Civ. P. 3(a) ("A civil action may . . . be commenced by the issuance of a summons when (1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and (2) The court makes an order stating the nature and purpose of the action and granting the requested permission.")

[35] (Verified Compl., ECF No. 10.)

Complaint") on 12 April 2023.[36] JBC asserted ten claims against the City in the Amended Complaint: (i) breach of contract, (ii) material alteration/fundamental change, (iii) breach of expressed & implied warranties, (iv) breach of the implied covenant of good faith and fair dealing, (v) misrepresentation, (vi) mutual mistake, (vii) violation of the Prompt Payment Act, (viii) unjust enrichment, (ix) quantum meruit, and (x) pass-through claims of subcontractors.[37]

22. On 1 June 2023, the City filed the Motion, seeking dismissal of each of JBC's ten claims.[38] JBC later voluntarily dismissed four of its claims: material alteration/fundamental change, misrepresentation, unjust enrichment, and quantum meruit.[39]

23. After full briefing, the Court convened a hearing on the Motion on 2 November 2023, at which all parties were represented by counsel (the "Hearing"). The Motion is now ripe for resolution.

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[36] (Am. Compl., ECF No. 2.)

[37] (Am. Compl. ¶¶ 69–142.)

[38] (Mots.) Although the City moved to dismiss JBC's claim for violation of the Prompt Payment Act, it conceded in its brief supporting the Motion and at the Hearing that this claim should survive the City's Motion. Accordingly, the Court will deny the Motion to the extent the City seeks dismissal of this claim. (*See* Def. City Charlotte's Br. Supp. Mots. Dismiss 2 [hereinafter "City's Br. Supp."], ECF No. 29; Tr. 16:04–07.)

[39] (Johnson Bros. Corp.'s Notice Dismissal Certain Causes Action Without Prejudice, ECF No. 82.)

III.

LEGAL STANDARD

24. The City brings the Motion under Rules 12(b)(1), 12(b)(2), and 12(b)(6),[40] and, as noted above, seeks dismissal of JBC's claims based on sovereign immunity.[41] In North Carolina, the appropriate rule for consideration of a motion to dismiss on the grounds of sovereign immunity is somewhat unsettled. *See, e.g.*, *Battle Ridge Cos. v. N.C. Dep't Transp.*, 161 N.C. App. 156, 157 (2003) ("Our courts have held that the defense of sovereign immunity is a Rule 12(b)(1) defense. Our courts have also held that the defense of sovereign immunity is a matter of personal jurisdiction that would fall under Rule 12(b)(2)[.]" (internal citation omitted)); *Farmer v. Troy Univ.*, 382 N.C. 366, 369–70 (2022) (reviewing a motion to dismiss on the grounds of sovereign immunity made under 12(b)(6)). Our Court of Appeals, however, recently determined that "[issues of sovereign immunity] should be classified as [issues] of personal jurisdiction under Rule 12(b)(2)." *Torres v. City of Raleigh*, 288 N.C. App. 617, 620 (2023). Accordingly, the Court will construe the Motion for dismissal on sovereign immunity grounds as an issue of personal jurisdiction under Rule 12(b)(2) and apply the appropriate standard of review for motions under that Rule.

25. "The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Id.*

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[40] (*See* Mots.; City's Br. Supp.19.)

[41] (City's Br. Supp. 23–34; *see also* Mots. 2.)

(quoting *Banc of Am. Sec., LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693 (2005)).

> When neither party submits evidence, the allegations of the complaint must disclose jurisdiction although the particulars of jurisdiction need not be alleged. The trial judge must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court's exercise of personal jurisdiction.
>
> If the defendant supplements his motion to dismiss with an affidavit or other supporting evidence, the allegations in the complaint can no longer be taken as true or controlling and plaintiff cannot rest on the allegations of the complaint. In this circumstance, in order to determine whether there is evidence to support an exercise of personal jurisdiction, the court then considers (1) any allegations in the complaint that are not controverted by the defendant's affidavit and (2) all facts in the affidavit (which are uncontroverted because of the plaintiff's failure to offer evidence.)

Parker v. Town of Erwin, 243 N.C. App. 84, 96 (2015) (cleaned up) (quoting *Banc of Am. Sec., LLC*, 169 N.C. App. at 693–94).

26. When "the parties each submit[ ] affidavits, depositions, and other documentary evidence to the trial court for consideration as to whether it ha[s] personal jurisdiction[,]" the Court "ha[s] the responsibility of acting as a fact-finder, and [is] responsible for determining the weight and sufficiency of the evidence." *Id.* at 99 (cleaned up). "In such circumstances . . . a plaintiff then has the ultimate burden of proving jurisdiction rather than the initial burden of establishing *prima facie* that jurisdiction was proper." *Id.* at 97 (cleaned up).

27. The City also seeks dismissal of all claims apart from JBC's claim for violation of the Prompt Payment Act under Rule 12(b)(6) on the ground that they are barred by the applicable statute of limitations. When deciding whether to dismiss for

failure to state a claim under Rule 12(b)(6), the Court considers "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Corwin v. Brit. Am. Tobacco, PLC*, 371 N.C. 605, 615 (2018) (quoting *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51 (2016)).

28. "[D]ismissal pursuant to Rule 12(b)(6) is proper when '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Corwin*, 371 N.C. at 615 (quoting *Wood v. Guilford County*, 355 N.C. 161, 166 (2002)).

29. Under Rule 12(b)(6), "the trial court is to construe the pleading liberally and in the light most favorable to the plaintiff, taking as true and admitted all well-pleaded factual allegations contained within the complaint." *Donovan v. Fiumara*, 114 N.C. App. 524, 526 (1994) (cleaned up); *see also, e.g.*, *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019) (recognizing that, under Rule 12(b)(6), the allegations of the complaint should be "view[ed] as true and in the light most favorable to the non-moving party") (cleaned up).

30. When considering a motion to dismiss under Rule 12(b)(6), a court "may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant." *Oberlin Cap., L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001); *see, e.g.*, *Deluca v. River Bluff Holdings II, LLC*, 2015 NCBC LEXIS 12, at *8 (N.C. Super. Ct. Jan.

28, 2015) (stating that under Rule 12(b)(6), "a trial court may properly consider a contract that is the subject matter of the complaint, even if the plaintiff did not attach it to the complaint[ ]").

IV.

ANALYSIS

A. Sovereign Immunity

31. The Court addresses the City's sovereign immunity defense on a claim-by-claim basis.

1. Breach of Contract and Pass-Through Claims

32. "As a general rule, under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity." *Wray v. City of Greensboro*, 370 N.C. 41, 47 (2017) (cleaned up). "Governmental immunity is that portion of the State's sovereign immunity which extends to local governments." *Id.* "Although the State's sovereign immunity applies to both its governmental and proprietary functions, the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." *Providence Volunteer Fire Dep't, Inc. v. Town of Weddington*, 382 N.C. 199, 211–12 (2022) (cleaned up).

a. Governmental Activity

33. The City asserts that the acts which gave rise to JBC's claims—the extension of an operating streetcar system—were committed pursuant to the City's

governmental function.[42] JBC relies upon the Court of Appeals' decision in *Town of Sandy Creek v. E. Coast Contracting, Inc.*, 226 N.C. App. 576 (2013), to contend in opposition that the City's acts in contracting for the construction of the streetcar system were proprietary functions because "a local governmental unit acts in a proprietary function when it contracts with engineering and construction companies, regardless of whether the project under construction will be a governmental function once it is completed."[43]

34. Both the City and JBC have submitted affidavits and documentary evidence in support of and in opposition to the Motion.[44] As a result, the Court must determine the weight and sufficiency of that evidence. *See Parker*, 243 N.C. App. at 99. Accordingly, the Court hereby enters the following findings of fact and conclusions of law on whether the City's acts giving rise to JBC's claims were committed pursuant to the City's governmental function or its proprietary function.

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[42] (City's Br. Supp. 21–23.)

[43] (*See* Pl. Johnson Bros. Corporation, a Southland Company's Br. Opp'n City of Charlotte's Mots. Dismiss 13 [hereinafter, "JBC's Br. Opp'n"] (quoting *Town of Sandy Creek*, 226 N.C. App. at 581–82), ECF No. 30.)

[44] (*See* Aff. Kelly Ridall Goforth Supp. Def.'s Mots. Dismiss, dated Aug. 29, 2023 [hereinafter, "Goforth Aff."], ECF No. 27; Aff. Imad Mohammed Supp. Pl.'s Br. Opp'n City's Mots. Dismiss, dated Sept. 20, 2023 [hereinafter, "Mohammed Aff."], ECF No. 31.) In his affidavit, Mohammed lists 26 exhibits and asserts that they are "true and correct copies of project correspondence between JBC and [the City.]" (Mohammed Aff. ¶ 3.) The documents to which Mohammed refers are attached as exhibits to JBC's brief in opposition to the Motion. (*See* Pl.'s Johnson Bros. Corporation, a Southland Company's Br. Opp'n Def. City of Charlotte's Mots. Dismiss Exs. 3–29, ECF Nos. 35–62.)

FINDINGS OF FACT[45]

35. Public transportation in Charlotte, North Carolina is provided by the Charlotte Area Transit System and all public transportation assets are owned by the City.[46] The CityLYNX Gold Line Streetcar (the "Gold Line") is a streetcar system that is being implemented in Charlotte in phases as a part of the Charlotte Area Transit System's public transportation plan.[47] The Gold Line opened for service to the public in 2021 and has been free of charge to users since that time.[48]

36. Nearly all public transit services in the United States, including buses, light rail, streetcars, and paratransit, are provided by public agencies, and the twenty-two streetcar agencies currently operating across the country are either public transportation authorities, local governments, or non-profit agencies.[49]

CONCLUSIONS OF LAW

37. Our Supreme Court has "long held that a 'governmental' function is an activity that is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself." *Estate of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Recreation Dep't*, 366 N.C. 195, 199 (2012). The Supreme Court set forth the following test in *Estate of Williams* to ascertain

[45] Any findings of Fact that are more appropriately deemed Conclusions of Law are incorporated by reference into the Court's Conclusions of Law.

[46] (Goforth Aff. ¶ 6.)

[47] (Goforth Aff. ¶¶ 7–8.)

[48] (Goforth Aff. ¶ 9.)

[49] (Goforth Aff. ¶¶ 4–5.)

"whether an action undertaken by a county or municipality is governmental or proprietary in nature[:]"

> [T]he threshold inquiry in determining whether a function is proprietary or governmental is whether, and to what degree, the legislature has addressed the issue. . . .
>
> [W]hen an activity has not been designated as governmental or proprietary by the legislature, that activity is necessarily governmental in nature when it can only be provided by a governmental agency or instrumentality. . . .
>
> [W]hen the particular service can be performed both privately and publicly, the inquiry involves consideration of a number of additional factors, of which no single factor is dispositive. Relevant to this inquiry is whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider. We conclude that consideration of these factors provides the guidance needed to identify the distinction between a governmental and proprietary activity.

Id. at 200, 202–203.

38. Turning to the first prong of the *Estate of Williams* test—the threshold inquiry—it is undisputed that the legislature has not specifically determined whether the construction of an extension of a streetcar system or providing the streetcar system itself reflects a governmental or a proprietary function. Therefore, the Court must turn to the second and third prongs of the *Estate of Williams* test. Here, the evidence shows that the City does not charge a fee for its streetcar service and that streetcar systems in the United States are typically a component of public transportation provided by public agencies.[50] These "additional factors" as contemplated by the third prong of the *Estate of Williams* test compel the conclusion

[50] (Goforth Aff. ¶¶ 4–5.)

that the City's provision of its streetcar system is a governmental activity. *See, e.g.*, *Providence Volunteer Fire Dep't, Inc.*, 382 N.C. at 217 (holding that the "additional factors mentioned in *Estate of Williams* . . . clearly tend[] to suggest that the activities . . . were governmental" where the services a town provided were traditionally provided by the government, either directly or through contracts with private entities, and the town did not charge a fee for the service or make a profit in connection with the service.) JBC does not allege facts or offer evidence to challenge otherwise.[51]

39. Further, the Court finds JBC's reliance on *Town of Sandy Creek* unavailing. In *Town of Sandy Creek*, the Court of Appeals divided the governmental entity's activity between the provision of the public service and the contracting for its construction and determined the latter to be proprietary. 226 N.C. App. at 581–82. The Supreme Court, however, rejected that approach in *Providence Volunteer Fire Department, Inc.*, holding instead that the proper inquiry to determine whether a governmental entity's act is a governmental function is the three-step test provided by *Estate of Williams*. The Court stated:

> [W]e decline [the plaintiff's] invitation to divide the activity in which the [t]own was engaged into multiple, separate pieces[.] . . . [G]iven that [the town] would need a fire station in order to provide service to the [t]own and given that the transaction reflected in the [contract] set out the manner in which the needed fire station would be provided, we are unable to divorce the provisions of the [contract] from the remainder of the overall transaction between the parties, which was clearly intended to ensure that the residents of the [t]own received fire protection services.

[51] (*See generally* Mohammed Aff.)

Providence Volunteer Fire Dep't, Inc., 382 N.C. at 218.

40. Based on the above, the Court concludes that, because the City's provision of the streetcar system is a governmental function under the third prong of the *Estate of Williams* test, the City is, absent waiver, entitled to governmental immunity against JBC's claims.

b. Waiver of Governmental Immunity

41. The Court next considers whether the City has waived its governmental immunity and consented to be sued on JBC's claims under the Contract. Our Supreme Court has held that "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract . . . [I]n causes of action on contract, . . . the doctrine of sovereign immunity will not be a defense to the State." *Smith v. State*, 289 N.C. 303, 320 (1976). "[A] waiver of governmental immunity is implied, and effectively alleged, when the plaintiff pleads a contract claim." *Wray v. City of Greensboro*, 370 N.C. 41, 48 (2017). "Thus, an allegation of a valid contract is an allegation of waiver of governmental immunity." *Id.*

42. The City contends that, since the Contract requires that the contractor comply with the Notice and Documentation Requirements to receive additional compensation above the contract price, JBC's failure to satisfy the Notice and Documentation Requirements for each component of its breach of contract claim bars

JBC's claim under governmental immunity.[52] For the same reason, the City argues that the pass-through claims of JBC's subcontractors should be dismissed. Like with JBC's contract claim, the City argues that the SSRS conditions subcontractor recovery on compliance with the same notice and documentation procedure, which the City contends JBC did not follow here.[53]

43. In response, JBC argues that it is inappropriate for the Court to consider whether JBC has complied with the contractual procedures for recovery at this stage of the litigation because the Court is not to consider the merits of a claim when addressing the applicability of sovereign immunity.[54] JBC contends that the inquiry into sovereign immunity at this stage is determined solely by whether a plaintiff has pleaded the existence of a valid contract with the City.[55] The Court agrees with JBC.

44. The general rule, as announced in *Smith v. State*, is that "that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." 289 N.C. at 320. Further, our Court of Appeals has clarified that "consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are sufficient to establish a waiver by the State of sovereign immunity." *Can Am S., LLC v. State*, 234 N.C. App. 119, 126 (2014)

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[52] (City's Br. Supp. 24–30.)

[53] (City's Br. Supp. 33–34.)

[54] (JBC's Br. Opp'n 12–13.)

[55] (JBC's Br Opp'n 12.)

(quoting *Fabrikant v. Currituck County*, 174 N.C. App 30, 38 (2005)). To meet this burden, a plaintiff need only "plead[ ] with particularity the circumstances surrounding their entry into [ ] valid contracts with [the State.]" *Can Am S., LLC*, 234 N.C. App. at 126; *see also Wray*, 370 N.C. at 50 (holding that plaintiff's allegations that the defendant City of Greensboro failed to honor its contractual obligations to plaintiff were sufficient to establish wavier of governmental immunity "[i]n light of the low bar for notice pleading . . . as well as the waiver of governmental immunity that is inferred from the pleading of a contract claim.")

45. In *Can Am South, LLC*, the State argued that the plaintiff could not establish waiver of sovereign immunity because the State did not breach the contracts at issue. 234 N.C. App. at 126. The court, however, rejected this argument, stating that "[courts] are not to consider the merits of a claim when addressing the applicability of sovereign immunity as a potential defense to liability." *Id.* at 127. The court then explained the following about the rule announced in *Smith*:

> [A]ll applicable caselaw leads us to conclude that the State waives its sovereign immunity when it *enters* into a contract with a private party, not when it engages in conduct that may or may not constitute a breach[.] It is plain to us that the phrases "in the event it breaches the contract" and "if it breaches that contract" in [*Smith* and its progeny] refer to the events that would typically trigger a suit against the State. They do not mean that the State only waives its sovereign immunity "in the event it breaches the contract" and "if it breaches that contract." To hold otherwise would require a plaintiff to definitively establish its entire cause of action against the State in its complaint without the opportunity to conduct discovery, a result that was clearly unintended by the *Smith* Court when it adopted the doctrine of implied waiver of sovereign immunity in this context.

Id. at 127 (emphasis in original).

46. The City contends that inquiry into JBC's compliance with the Notice and Documentation Requirements is not an inquiry into the merits of JBC's claim. Rather, the City posits that an inquiry into the merits of JBC's claim would focus on whether the City engaged in the conduct JBC alleges constituted a breach of the Contract, i.e. whether the City changed the traffic control plans, whether the City obstructed JBC's progress, etc.[56] This argument, however, is unpersuasive because determining compliance with conditions precedent (i.e., JBC's compliance with the Notice and Documentation Requirements) is a component of determining breach, which is therefore an inquiry into the merits of JBC's claim. For this reason, the Court concludes that *Smith* precludes the Court from considering whether JBC complied with the Notice and Documentation Requirements in determining whether the City has waived sovereign immunity on the current Motion.

47. Based on the above, the Court concludes that the City's entry into the Contract waived its governmental immunity to permit JBC's assertion of its breach of contract claim and the pass-through claims of its subcontractors. The City's Motion seeking dismissal of these claims on sovereign immunity grounds must therefore be denied.[57]

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[56] (Tr. 23:20–24:08.)

[57] The Court notes that the parties devoted significant portions of their briefs, (*see* JBC's Br. Opp'n 13–15; City's Reply Br. Supp. Mots. Dismiss [hereinafter, "City's Reply Br."] 8–11, ECF No. 67), and significant argument at the Hearing on whether the Notice and Documentation Requirements apply to JBC's Contract-based claims and whether the Amended Complaint and its referenced documents establish that JBC complied with those Requirements. Since the Court has determined that JBC's allegations are sufficient to plead waiver of sovereign immunity for claims arising from the Contract, the Court does not reach these arguments on this Motion.

2. <u>Breach of Warranty</u>

48. The City also seeks dismissal of JBC's claim for breach of warranty on sovereign immunity grounds.[58] The Court finds the City's argument without merit.

49. Our Court of Appeals has recognized that plans and specifications published in accord with the SSRS constitute "positive representations upon which a contractor is justified in relying" and that a governmental agency "which furnishes inaccurate information as a basis for bids may be liable on a breach of warranty theory[.]" *Battle Ridge Cos.*, 161 N.C. App. at 160 (quoting *Lowder, Inc. v. Highway Comm'n*, 26 N.C. App. 622, 638 (1975)). "[A] claim for relief based upon a breach of an implied warranty of plans and specifications arises under the contract and, if sufficiently pled, will withstand a [ ] motion to dismiss on grounds of immunity." *Battle Ridge Cos.*, 161 N.C. App. at 160.

50. North Carolina has adopted the general rule that "a construction contractor who has followed plans and specifications furnished by the owner, or his architect or engineer, will not be responsible for consequences of defects in those plans or specifications[ ]" because "there is an implied warranty by the owner that the plans and specifications are suitable for the particular purpose, and that if they are complied with[,] the completed work will be adequate to accomplish the intended purpose." *Gilbert Eng'g Co. v. City of Asheville*, 74 N.C. App. 350, 362–63 (1985). "In order to establish a breach of such an implied warranty, the burden of proof is on the contractor to prove that the plans and specifications were adhered to, that they were

[58] (Mots. 4–5; *see also* City's Br. Supp. 23–24.)

defective, and that the defects were the proximate cause of the deficiency in the completed work." *Id.* at 363.

51. Here, JBC has alleged that the City published the Plans and Specifications, that JBC justifiably relied upon those Plans and Specifications,[59] that JBC proceeded with the Project in good faith, that "through additional effort and acceleration of its operation[, JBC] . . . substantially complete[d] the Project[,]"[60] and that as a result of the "inaccurate and inadequate" Plans and Specifications, JBC suffered injury.[61] The Court concludes that these allegations, if proven, would permit a jury to find each element of JBC's breach of warranty claim. As such, applying *Battle Ridge Cos.*, the Court will deny the City's Motion to dismiss this claim on sovereign immunity grounds.

3. <u>Mutual Mistake</u>

52. The City next seeks dismissal of JBC's claim for mutual mistake, also on grounds of sovereign immunity.[62] The City argues that since JBC's claim for mutual mistake posits that a valid contract was never formed between the City and JBC, and because the City's waiver of sovereign immunity extends only to its agreements with

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[59] (Am. Compl. ¶¶ 94–96.)

[60] (Am. Compl. ¶¶ 52, 55.)

[61] (Am. Compl. ¶ 99.)

[62] (Mots. 4–5; *see also* City's Br. Supp. 23–24.)

JBC pursuant to the Contract, JBC's claim seeking to invalidate the Contract is not a claim on which the City has agreed to be sued.[63]

53. JBC argues in opposition that the City misstates JBC's claim for mutual mistake, which is for an equitable adjustment of the Contract, not for the invalidation of the Contract as a whole.[64] The Court agrees with JBC.

54. JBC does not contend or allege that JBC and the City did not enter into a valid contract due to a mutual mistake of fact.[65] Rather, JBC contends that, due to a mutual mistake, it is entitled to reformation of the Contract. As discussed at length above, "in causes of action on contract [ ] the doctrine of sovereign immunity will not be a defense[.]" *Smith*, 289 N.C. at 320. Since JBC has pleaded entry into a valid contract, it has adequately pleaded waiver of sovereign immunity for claims on that contract, including its claim for mutual mistake. Accordingly, the Motion will be denied to the extent it seeks dismissal of JBC's claim for mutual mistake on sovereign immunity grounds.[66]

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[63] (Tr. 21:18–24.)

[64] (*See* JBC's Br. Opp'n 19–20; Tr. 114:02–115:09.)

[65] (*See* Am. Compl. ¶¶ 113–21.)

[66] The City also argues in its reply brief that JBC's claim for mutual mistake should be dismissed because JBC's "broad allegations fail to satisfy Rule 9(b)'s requirements." (City's Reply Br. 13.) The City did not argue that JBC's claim was insufficient under Rule 9(b) in its supporting brief, and the issue does not appear in JBC's responsive brief. Business Court Rule 7.7 makes clear that "the Court may decline to consider issues or arguments raised by the moving party for the first time in a reply brief." Accordingly, the Court will not consider the City's Rule 9(b) argument on this Motion.

B. Statute of Limitations

55. Separate and apart from its sovereign immunity arguments, the City also seeks dismissal of JBC's claims for breach of contract, breach of express and implied warranties, breach of the implied covenant of good faith and fair dealing, mutual mistake, and subcontractor pass-through claims under Rule 12(b)(6) as barred by the limitations periods set forth in N.C.G.S. § 1-53(a), the statute of limitations both parties agree applies to JBC's claims.[67]

56. Section 1-53(a) provides, in relevant part, as follows:

> Within two years—
> (1) An action against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied. Unless otherwise provided by law, if the preceding sentence of this subsection would bar commencement of a cause of action arising out of a contract to improve real property: (i) such an action may be brought no later than 90 days after substantial completion, provided proper notice of the claim has been given if required by contract, or (ii) if prior to substantial completion the contract was terminated by either party, such an action may be brought no later than 90 days after the date of termination of the contract. As used in this subdivision, "substantial completion" has the same meaning as in G.S. 1-50(a)(5)c. This subdivision shall not apply to actions based upon bonds, notes and interest coupons or when a different period of limitation is prescribed by this Article.

57. "A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136 (1996). "Whether a

[67] (City's Br. Supp. 7–12.)

statute of limitations defense should be resolved by a Rule 12(b)(6) motion or must await a Rule 56 motion for summary judgment depends on whether the facts necessary to adjudicate the defense are demonstrated by the complaint itself or whether additional evidence must be considered." *BDM Invs. v. Lenhil, Inc.*, 2012 NCBC LEXIS 7, at *29 (N.C. Super. Ct. Jan. 18, 2012); *see also Window World of Baton Rouge, LLC v. Window World, Inc.*, 2017 NCBC LEXIS 60, at *23 (N.C. Super. Ct. July 12, 2017). "The statute of limitations defense is inflexible and unyielding, and the defendants are vested with the right to rely on it as a defense. The trial court has no discretion when considering whether a claim is barred by the statute of limitations." *Fisher v. Anderson*, 193 N.C. App. 438, 439 (2008) (cleaned up).

58. JBC alleges that substantial completion of the Project occurred on 30 August 2021.[68] Since this action was commenced on 31 January 2023, long after the 90-day period following substantial completion had expired, JBC's claims are timely only if they accrued after 31 January 2021.

59. The City contends that the Amended Complaint and its referenced documents demonstrate that JBC's claims accrued more than two years prior to the initiation of this action on 31 January 2023 and thus are time-barred.[69] JBC contends in opposition that its claims are timely because JBC did not have the right to maintain a lawsuit for breach of contract until the Contract's Mediation Process was completed on 27 January 2023, citing *Thurston Motor Lines, Inc. v. General Motors*

[68] (Am. Compl. ¶ 19; Tr. 83:13–15.)

[69] (City's Br. Supp. 7–12.)

Corp., 258 N.C. 323, 325 (1962) ("In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises[.]") (cleaned up). JBC argues that since it filed this action only four days after its claims accrued, it acted well within the limitations periods in section 1-53(a).[70]

60. The Court concludes that the City has the better of this dispute. Under North Carolina law, "[c]ivil actions can only be commenced within the periods prescribed [by the applicable statute], after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute." N.C.G.S. § 1-15(a). Our Supreme Court has recognized that a cause of action accrues at "the point in time when the elements necessary for a legal wrong coalesce." *Black v. Littlejohn*, 312 N.C. 626, 633 (1985); *see also Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 184 (1976) ("The cause of action accrues [w]hen the wrong is complete[.]"). In other words, in North Carolina:

> [t]he accrual of the cause of action must [ ] be reckoned from the time when the first injury was sustained . . . When the right of the party is once violated, even in ever so small a degree, the injury, in the technical acceptation of that term, at once springs into existence and the cause of action is complete.

Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., 180 N.C. App. 257, 262 (2006) (internal citation omitted).

61. Our courts have consistently held that a claim for breach of contract accrues when the contract is breached, i.e., when the promise is broken. *See Christenbury*

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[70] (JBC's Br. Opp'n 8–9.)

Eye Ctr., P.A. v. Medflow, Inc., 370 N.C. 1, 6 (2017) ("It is well settled that where the right of a party is once violated the injury immediately ensues and the cause of action arises. A cause of action is complete and the statute of limitations begins to run upon the inception of the loss from the contract, generally the date the promise is broken.") (cleaned up); *Penley v. Penley*, 314 N.C. 1, 20 (1985) ("The statute begins to run on the date the promise is broken."); *MacDonald v. Univ. N.C. Chapel Hill*, 299 N.C. 457, 582 (1980) ("A cause of action for a suit involving a breach of contract accrues as of the date of breach."); *Miller v. Randolph*, 124 N.C. App. 779, 781 (1996) (same); *Liptrap v. City of High Point*, 128 N.C. App. 353, 355 (1998) (same). Accordingly, JBC's breach of contract claim accrued when the City allegedly breached the Contract.

62. Contrary to JBC's contention, the Mediation Process agreed to by the parties in the Contract does not extend the statute of limitations for any claims. It is not a tolling agreement. It merely provides a mechanism for resolution of claims that JBC must follow prior to filing its claims in court; it does not alter the fact that whatever claims JBC brings in court must be timely. Rather, it is incumbent upon the parties to initiate the Mediation Process promptly to ensure that, if the claims are unresolved in the Mediation Process, they will be timely when brought in court.

63. Further, JBC's reliance on *Thurston Motor Lines, Inc.* and its progeny is misplaced. First, the majority of the cases upon which JBC relies are not breach of contract cases. Second, and most importantly, none of these cases provides that a pre-filing mediation requirement acts as a tolling agreement and extends the statute

of limitations. Rather, in the cases JBC cites, our courts merely recognized and applied the general rule that a cause of action does not accrue, and the plaintiff does not have the right to institute and maintain a suit, until a legal wrong is complete. *Thurston Motor Lines, Inc.*, 258 N.C. at 327 (holding that "plaintiff suffered injury and his rights were invaded", and thus his claim accrued, at the time that a defective truck was sold to him); *see also Ocean Hill Joint Venture v. N.C. Dep't Env't, Health & Nat. Res.*, 333 N.C. 318, 323 (1993) (holding that the State as plaintiff did not have the right to file an action to collect a civil penalty until the elements set forth by the statute providing for the penalty had occurred); *Raftery*, 291 N.C. at 184 (holding that plaintiff's claim for wrongful death was timely because plaintiff brought the action for wrongful death within two years of the intestate's death, which was when the wrong was complete).

64. Indeed, the only case JBC cites that involves a contract claim, *Liptrap*, states and applies the general rule that a breach of contract claim accrues when the promise is broken. *See Liptrap*, 128 N.C. App. at 356, 360–61 (holding that plaintiffs' contract claims accrued when defendant, City of High Point, passed a resolution which froze payments owed to plaintiffs under their employment contracts—thereby breaching the contract).

65. JBC also relies on *Nello L. Teer Co. v. Jones Bros., Inc.*, 182 N.C. App. 300 (2007), in which the court held that a stay should have been granted because the plaintiff was contractually obligated to exhaust administrative remedies for its claims before seeking judicial relief. *Id.* at 305. JBC argues that, under *Nello L. Teer*, its

action would have been premature before completion of the Mediation Process and therefore JBC did not have the right to institute and maintain its claims until after the Mediation Process was complete.

66. JBC's reliance on *Nello L. Teer*, however, is similarly misplaced. Although *Nello L. Teer* provides that JBC's claims would have been premature had they been filed prior to completion of the Mediation Process, the case does not stand for the proposition that JBC's claim did not accrue until that process was complete. Further, this argument improperly conflates ripeness and accrual; although the moment a claim becomes ripe for judicial review and the moment a claim accrues often coincide, ripeness and accrual are separate and distinct and can occur at different points in time. In sum, while *Nello L. Teer* may bear upon when JBC's claim ripened, it does not address or determine when JBC's claim accrued.[71]

67. The Court thus turns to an examination of when the alleged legal wrong—the purported breach of contract—is alleged to have occurred, since that determines when JBC's contract claim accrued.

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[71] The Court notes that JBC's theory of accrual has been rejected by courts in other jurisdictions as well. For example, the Appellate Court of Maryland (Maryland's intermediate appellate court) stated that "[t]he fact that [the parties] had contracted . . . to engage in non-binding arbitration as a condition precedent to bringing suit in circuit court did not mean that [plaintiff's] causes of action . . . did not accrue [ ] when all of their elements had arisen . . . It meant only that the parties, and each of them, had to take timely steps to engage in arbitration before limitations expired; enter into a further agreement to toll limitations; or file suit and request a stay pending arbitration." *Shailendra Kumar, P.A. v. Dhanda*, 426 Md. 185, 197 (Md. App. Ct. 2013); *see also Wash. Tennis & Educ. Found., Inc. v. Clark Nexsen Inc.*, 324 F.Supp.3d 128, 137–38 (D.D.C. 2018) (stating that the contention that "the date of mediation is what counts for statute of limitations purposes is flat wrong[ ]" and declining to determine that the filing of a mediation demand equitably tolled the statute of limitations).

68. JBC contends that its claim is timely because the purported breach was the City's refusal to pay JBC for the costs it incurred in excess of the contract price, and thus the breach did not occur and the claim did not accrue until the City made a definitive declaration at the conclusion of the Mediation Process in January 2023 that JBC's claims for further payment were denied.[72] But the Court must consider the claim as pleaded, and JBC has not pleaded its claim by alleging that the City breached by refusing to pay JBC the extra costs it claims it is entitled to under the Contract. *See Davis v. Davis Funeral Serv., Inc.*, 2023 NCBC LEXIS 133, at *6 (N.C. Super. Ct. Oct. 25, 2023) (holding that plaintiff's contract claim was partially time-barred and declining to measure the statute of limitations based upon a theory of liability that was not alleged in the complaint).

69. Rather, JBC bases its breach of contract claim on four alleged breaches: (i) the City's changes to the traffic control patterns and planned workhour availability from those set forth in the Plans and Specifications,[73] (ii) the City's failure to mitigate any obstructions or conflicts that would interfere with JBC's work on the Project,[74] (iii) the City's revisions to the designs and plans agreed upon in the Contract, namely the City's rejection of the use of precast storm drain boxes and discrepancies in plans for reconstruction of the Hawthorne Lane bridge,[75] and (iv) the City's wrongful

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[72] (Tr. 86:07–19.)

[73] (Am. Compl. ¶¶ 20–29, 75—76.)

[74] (Am. Compl. ¶¶ 30–31, 77–78.)

[75] (Am. Compl. ¶¶ 32–39, 75.)

assessment of liquidated damages, withholding of compensation throughout the duration of the Project, and refusal to grant time extensions.[76] JBC also alleges that the City continued the objectionable conduct after the Project was put into public use when it submitted extensive lists of tasks that exceeded the scope of the Contract, threatened to terminate JBC from the Project if the tasks were not completed, and refused to extend the deadline for completion of the Contract.[77]

70. With regard to alleged breaches (i) and (iii) above, the Amended Complaint's allegations show that JBC was on notice of the alleged conduct as early as 2018, and no later than 2020. JBC was aware of the City's changes to the traffic control plans and its refusal to allow JBC to use precast storm drain structures no later than 6 March 2018 when JBC sent its March 2018 Letter to the City attributing delays in progress in part to this conduct.[78] Similarly, JBC was aware of the issues arising from the reconstruction of the Hawthorne Lane bridge no later than 28 February 2019 when JBC sent a letter to the City "providing a detailed outline of why the Hawthorne Bridge issues were outside JBC's control" and "a timeline of all the proposals . . . to remedy the existing design deficiencies[.]"[79] Finally, JBC was on notice of alleged design changes and the changes to the planned workhour availability no later than 30 September 2020. It was at that time JBC sent the September 2020

[76] (Am. Compl. ¶¶ 55–58, 79.)

[77] (Am. Compl. ¶¶ 59–68, 79.)

[78] (*See* Am. Compl. ¶ 40; March 2018 Letter.)

[79] (*See* Am. Compl. ¶ 47; *see also* Index Exs. Filed Supp. Def's Mot. Dismiss Ex. 2.)

Claim Letter, complaining that the City's plans were "inaccurate, deficient, and inadequate" while attributing ten improper revisions and deficiencies to the City, and contending that the "City imposed workhour requirements that were far more restrictive and disruptive than those establish[ed] in the Contract[.]"[80]

71. As to alleged breach (ii), JBC alleges that "[a]s 2020 progressed . . . [d]espite the City's duty to coordinate with existing utilities, JBC went months without any coordination or schedule update from an energy utility[.]"[81] JBC also complained in its September 2020 Claim Letter that the time of performance and cost of construction was increased as a result of "innumerable conflicts with existing utilities" that were not shown on the [Plans and Specifications]."[82] Thus, it is clear from this letter that JBC encountered issues arising from the City's alleged failure to coordinate with utilities and interference from other contractors, and thereby had notice of these issues by at least 30 September 2020.

72. With regard to alleged breach (iv), JBC asserted in its September 2020 Claim Letter that "[t]he City repeatedly failed to process the monthly progress payments in a timely and complete manner as required by the Contract[ ]" and that "[a]s warranted by the facts, JBC is [ ] entitled to an extension of time" beyond the Contract's completion date.[83] Thus, JBC had notice of the City's alleged refusal to

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[80] (*See* Am. Compl. ¶ 56; September 2020 Claim Letter 3, 6–7.)

[81] (Am. Compl. ¶ 53.)

[82] (*See* Am. Compl. ¶ 56; *see also* September 2020 Claim Letter 3–4, 10–11, 12–14.)

[83] (September 2020 Claim letter 14–15.)

grant time extensions and failure to make proper progress payments by at least 30 September 2020.[84]

73. In sum, the allegations and the referenced documents demonstrate that not only did much of the conduct giving rise to JBC's breach of contract claim occur prior to 31 January 2021, but also that JBC was aware of the conduct more than two years before it instituted this action. Therefore, to the extent that JBC's breach of contract claim arises out of alleged breaches of the Contract that occurred prior to 31 January 2021, the Court concludes that the claim is barred by the statute of limitations in section 1-53(a). JBC's breach of contract claim will therefore proceed to discovery only to the extent that it seeks to recover for alleged breaches of the Contract that occurred on or after 31 January 2021.[85]

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[84] (*See* Am. Compl. ¶¶ 55–58; September 2020 Claim Letter 14–15.)

[85] The Court notes that, under North Carolina law, "a party may either by agreement or conduct estop himself from pleading the statute of limitations as a defense to an obligation." *Franklin v. Franks*, 205 N.C. 96, 114 (1933). To be effective, however, "[a] party's intent to waive or shorten the statute of limitations for wrongs committed by another contracting party should be expressed clearly, unambiguously, and explicitly." *Frye Reg'l Med. Ctr., Inc. v. Blue Cross Blue Shield of N. Carolina, Inc.*, 2020 NCBC LEXIS 51, at *26 (N.C. Super. Ct. Apr. 17, 2020) (citing *Beachcrete, Inc. v. Water St. Ctr. Assocs.*, 172 N.C. App. 156, 161 (2005)). Here, JBC has pleaded in its Reply to the City's Counterclaims that "[t]o the extent the causes of action asserted in the Counterclaim sound in equity, they are barred on the grounds of waiver." (Pl. Johnson Bros. Corporation, A Southland Company's Reply and Affirmative Defenses Def.'s Countercl. and Pls.'s Third-Party Compl. Against URS Corporation, Second Affirmative Defense, ECF No. 7.) JBC also argues in its opposition brief that it "has alleged that the City constructively waived *notice provisions* by its own action/inaction." (JBC's Br. Opp'n 10 (emphasis added).) Nowhere, however, has JBC pleaded or argued that the City, by agreement or by its conduct, has waived or modified the statute of limitations for the assertion of any accrued claims, including the City's breach of contract claim. Accordingly, JBC's waiver defense does not preclude the dismissal of JBC's breach of contract claim on the grounds set forth above.

74. JBC's claim for mutual mistake, however, is wholly barred by the statute of limitations.

75. Our Court of Appeals has provided that "[f]or a claim based on fraud or mistake . . . the cause of action shall not be deemed to have accrued until the discovery of the aggrieved party of the facts constituting the fraud or mistake. A plaintiff discovers the mistake—and therefore triggers the running of the [ ] limitations period—when he actually learns of its existence or should have discovered the mistake in the exercise of due diligence." *Wells Fargo Bank, N.A. v. Coleman*, 239 N.C. App. 239, 244 (2015).

76. JBC's claim for mutual mistake is premised upon the allegation that the City gave JBC, and JBC thereafter relied upon, inaccurate information concerning the traffic control plans and the work hours available to the contractor.[86] As discussed at length above, the Amended Complaint and the referenced documents provide that JBC complained about changes to the traffic control plan on 6 March 2018 and complained of the workhour availability on 30 September 2020. It is therefore clear from JBC's own pleading that JBC learned of the existence of the alleged mistakes well before 31 January 2021. As a result, the Court concludes that JBC's claim for mutual mistake is time-barred under section 1-53(a) and will be dismissed on that basis.

77. JBC's claim for breach of implied and express warranties is also wholly barred by the statute of limitations.

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[86] (Am. Compl. ¶¶ 114–20.)

78. In North Carolina, "a contracting [state agency] which furnishes inaccurate information as a basis for bids may be liable on a breach of warranty[.]" *Lowder*, 26 N.C. App. at 638. To state a claim for breach of warranty arising from plans and specifications as contemplated in *Lowder*, a claimant must allege that "the plans and specifications were adhered to, that they were defective, and that the defects were the proximate cause of the deficiency in the completed work." *ABL Plumbing & Heating Corp. v. Bladen Cnty. Bd. Educ.*, 175 N.C. App. 164, 169 (2005).

79. In support of its breach of warranty claim, JBC alleges that "[t]he City published [the Plans and Specifications for this Project]" and that "[i]n doing so, the [C]ity both expressly and impliedly warranted that the Plans and Specifications were adequate[,]" but that the Plans and Specifications were "inaccurate and inadequate for their intended use."[87] JBC alleges that the Plans and Specifications existed by at least 27 February 2017.[88] Further, JBC asserted in its September 2020 Claim letter that "JBC reasonably relied on the adequacy and accuracy of the [Plans and Specifications]," and the City did not allow JBC to "perform its work under [the] as-bid conditions[,]"[89] that JBC "encountered innumerable conflicts with existing utilities that were not shown on the plans[,]"[90] and that, in general, "[t]he City's

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[87] (Am. Compl. ¶¶ 94, 95, 97.)

[88] (*See* Am. Compl. ¶ 19.)

[89] (September 2020 Claim Letter 2.)

[90] (September 2020 Claim Letter 3.)

original plans were inaccurate, deficient, and inadequate."[91] JBC's allegations make clear that JBC had notice of the alleged inaccuracy of the Plans and Specifications no later than 30 September 2020, more than two years prior to the initiation of this lawsuit. Accordingly, the Court concludes that JBC's claim for breach of warranty is time-barred under section 1-53(a) and will therefore be dismissed on that basis. *See ABL Plumbing & Heating Corp.*, 175 N.C. App. at 170–71 (dismissing plaintiff's claim for breach of warranty because plaintiff was aware of the injury arising from the breach of warranty more than two years before plaintiff filed its complaint and noting that "[f]urther damage incurred after the accrual of a cause of action only aggravates the original injury and does not restart the running of the statutory limitations period.")

C. Breach of the Implied Covenant of Good Faith and Fair Dealing

80. The City next contends that JBC's claim for breach of the implied covenant of good faith and fair dealing should be dismissed because it is premised upon the same facts as JBC's breach of contract claim and is therefore duplicative.[92] JBC disagrees, arguing that North Carolina courts have consistently declined to hold that claims for breach of the implied covenant of good faith and fair dealing must be dismissed as duplicative if the claim is premised on the same or similar facts as an accompanying breach of contract claim.[93]

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[91] (September 2020 Claim Letter 6.)

[92] (City's Br. Supp. 35–36.)

[93] (JBC's Br. Opp'n 20–21.)

81. Under North Carolina law, "where a party's claim for breach of the implied covenant of good faith and fair dealing is based on the same acts as its claim for breach of contract, we treat the former as part and parcel of the latter." *Cordaro v. Harrington Bank, FSB*, 260 N.C. App. 26, 38–39 (2018). "North Carolina state court decisions considering good faith and fair dealing claims that are 'part and parcel' of breach of contract claims . . . have concluded that the two claims merely stand or fall together, not that the independent good faith and fair dealing claim should necessarily be dismissed as duplicative." *Southeast Anesthesiology Consultants, PLLC v. Rose*, 2019 NCBC LEXIS 52, at *23 (N.C. Super. Ct. Aug. 20, 2019). Since JBC's implied covenant claim is based on the same alleged facts as its claim for breach of contract, the Court shall grant and deny the Motion as to this claim to the same extent as JBC's breach of contract claim.

IV.

CONCLUSION

82. **WHEREFORE**, for the reasons set forth above, the Court hereby **GRANTS in part** and **DENIES in part** the Motion as follows:

a. The Motion is **DENIED** under Rule 12(b)(2) for lack of personal jurisdiction on sovereign immunity grounds;

b. The Motion is **GRANTED** under Rule 12(b)(6) on JBC's claims for breach of contract (First Cause of Action), breach of the implied covenant of good faith and fair dealing (Fourth Cause of Action), and pass-through claims (Tenth Cause of Action) to the extent those claims arise from

conduct occurring before 31 January 2021, and those claims are hereby **DISMISSED with prejudice** to this extent as time-barred under the applicable statute of limitations;

c. The Motion is **GRANTED** under Rule 12(b)(6) on JBC's claim for breach of expressed and implied warranties (Third Cause of Action) and Mutual Mistake (Sixth Cause of Action), and those claims are hereby **DISMISSED with prejudice** as time-barred under the applicable statute of limitations;

d. The Motion is **DENIED** under Rule 12(b)(6) on JBC's claims for breach of contract (First Cause of Action), breach of the implied covenant of good faith and fair dealing (Fourth Cause of Action), and pass-through claims (Tenth Cause of Action) to the extent those claims arise from conduct occurring after 31 January 2021, and those claims shall proceed to discovery;

e. The Motion is **DENIED** as to JBC's claim for violations of the Prompt Payment Act (Seventh Cause of Action) and that claim shall proceed to discovery.[94]

SO ORDERED, this the 27th day of February, 2024.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge

[94] *See* footnote 38, *supra*.