

July 14, 2021

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BY FEDERAL EXPRESS

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Re: Town of Sherborn – Sherborn Library Project
December 28, 2016 Construction Contract (Five Star Building Corporation)
June 15, 2020 Takeover Agreement (Travelers Casualty and Surety Co. of America)
Performance Bond No. 007-SB-106605907 (Travelers Casualty and Surety Co. of America)
Notice of Claim for Contract Indemnification and
Notice of Unfair/Deceptive Acts/Practices and Demand for Relief – G.L. c. 93A, § 9

Dear Messrs. Ahern, Carver, O'Neill and Jones:

This letter serves as notice of the Town of Sherborn's claim for indemnification against Five Star Building Corp. (Five Star) and Travelers Casualty and Surety Company of America (Travelers) under section 3.18.1 of the General Conditions of the Sherborn Library Project construction contract between the Town and Five Star dated December 16, 2016; and the Town's claim of unfair and deceptive acts and practices under G.L. c. 93A, § 9, against Travelers, and against Beacon Consulting Group (BCG) and Five Star, the contractors hired by Travelers, as performance bond surety, to complete the project.

Recently, BCG notified the Town of the existence of damaged fiberboard ductwork in the Sherborn Library building. The damage extends to the ductwork seams. As noted in the May 5, 2021 letter to BCG from the project architect, Beacon Architectural Associates (BAA), the contract documents describe the ductwork seams as being sealed with a "mastic" containing non-friable asbestos. This information was known to Five Star, and therefore Travelers as performance bond surety, no later than the date of Five Star's contract and the performance bond provided by Travelers (i.e., December 28, 2016).

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The ductwork damage was caused by Five Star. As reflected in the enclosed September 4, 2019 Field Report 583 from the Town's former project manager, which was distributed to Five Star, damaged ductwork was discovered in the building in 2018 and "FSBC" was to correct that damage. Obviously, Five Star never did. Nor did Five Star ever assert that the Town (or any separate contractor) was responsible for the damage. If Five Star believed it was not responsible for the ductwork damage noted in Field Report 583, it certainly had plenty of time to make that belief known. It never did, and the time to do so has long since passed under the provisions of the contract (see, e.g., General Conditions, Articles 6 and 15). Whether Five Star's silence is deemed an admission of responsibility or waiver of a right to object, Travelers is bound thereby. Therefore, Five Star cannot honestly deny responsibility for the damaged fiberboard ductwork in the Sherborn Library building.

Since Travelers/BCG elected to use Five Star as its agent to complete the project—a decision the Town has always believed unwise (as noted in the Takeover Agreement) and, as events have proven, negligent—the knowledge of Five Star regarding the cause of the ductwork damage is imputed to Travelers/BCG no later than the date of the Takeover Agreement. See Fergus v. Ross, 477 Mass. 563, 566 (2017) (knowledge of agent imputed to principal). Moreover, Travelers is deemed to know, as of that date, all that could have reasonably been ascertained from a visual inspection of the Sherborn Library building. This would include the ductwork damage. Therefore, as of the date of the Takeover Agreement, if not earlier, Travelers was aware that Five Star damaged the ductwork. If Travelers failed to take the correction of that damage into account when it developed the project schedule, Travelers must bear the risk and consequences of that failure, not the Town.

The ductwork was vulnerable to damage because Five Star failed to protect it, which it was required to do by its contract, as noted in Field Report 583 and, more recently, in BAA's May 5, 2021 letter. As also noted in Field Report 583, Five Star's failure to protect the ductwork caused construction debris and rainwater (which had entered the building as a result of Five Star's failure to keep the building weather-tight) to enter the ductwork system. The rainwater also softened/damaged the ductwork material. Travelers/BCG's recent claim that the Town was responsible to advise Five Star how to protect the ductwork from damage is without merit. Five Star was fully aware of the sensitivity and lack of load-bearing capacity of the ductwork. It needed only common sense and a basic understanding of its contract to recognize the need to protect the ductwork from damage during the work.

Initially, contrary to the recent false statements from Travelers, BCG (and thus Travelers) admitted Five Star's responsibility for causing damage to the fiberboard ductwork. In its December 9, 2020 Request for Information (RFI) no. 347, BCG stated: "The existing fiber duct in boards in the 2nd floor crawl space have been damaged at joints by MEP and IT subcontractors." Although the

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Town understands that BCG is also alleging, in RFI 347, that the Town, through its separate IT contractor, is responsible for damage to the fiberboard ductwork, the evidence demonstrates that such allegation is false, and that Travelers and BCG (and Five Star) knew that the allegation was false before BCG issued the RFI.

More recently, however, in letters to the Town dated June 1, 2021 from BCG and June 30, 2021 from Travelers' legal counsel, Bradford R. Carver, Travelers has tried to retract its admission, wrongly alleging that the Town's IT contractor "more likely" caused the damage. In fact, in Mr. Carver's letter, which expressly refers to RFI 347, Travelers omits any mention of its earlier admission in RFI 347 that Five Star MEP subcontractors caused damage to the ductwork. Having admitted Five Star's responsibility, Travelers is now denying Five Star's responsibility and its prior admission of such responsibility. This conduct is an unfair and deceptive act and practice in violation of G.L. c. 176D and c. 93A.

Travelers' allegations are contrary to Field Report 583 and other available evidence. For example, adjacent to each item of damaged ductwork, fire sprinkler pipes and electrical wiring/conduit had been installed by Five Star. In order for that work to occur, Five Star's electrical and fire protection subcontractors would have had to move materials over the top of the ductwork. Travelers' assertion that the Town's IT contractor, which hung light-weight cabling on the underside of the roof interior, damaged the ductwork is unpersuasive and unsupported by the available evidence. An example is the enclosed copy of a photograph of damaged ductwork before any cabling had been installed.

Most disturbing, however, is Five Star's silence in the face of Travelers/BCG's false allegations, which constitutes, by omission, Five Star's active concealment of the role of its subcontractors in causing the damage. And in arguing the "plausibility" that the Town's IT contractor "likely" caused the damage, as set out in the BCG/Carver letters, Travelers and BCG are knowingly and willfully exploiting Five Star's concealment for their own advantage. Such conduct by Five Star, BCG and Travelers constitutes bad faith, an unfair and deceptive act and practice under G.L. c. 176D and c. 93A, a breach of contract, and a breach of the implied covenant of good faith and fair dealing.

In addition, Travelers' claim that the alleged presence of asbestos fibers in ductwork reported in a May 27, 2021 letter by R.I. Analytical (RIA), BCG's abatement consultant/subcontractor, "pre-dates commencement of the project" (Carver letter, p. 2) is unsupported. RIA itself concluded (RIA letter, p. 10) that there is no way to determine if the asbestos fibers pre-dated the project. Travelers' related allegation (id.) that damage to the ductwork on the second floor is irrelevant to what may have been found in ductwork on the ground and first floors raises the question of why, in light of that belief, BCG would have tested any areas of the ductwork beyond the damaged areas it was ordered

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to replace. Under the circumstances, that testing may certainly be said to be part of what the Town views as BCG's bad faith efforts to generate, if not outright fabricate, claims of delay against the Town.

In any event, this allegation was refuted by RIA. By concluding that it could not determine if the asbestos fibers pre-dated the project or resulted from damage to the ductwork, RIA concedes that such damage might be the source of the fibers. RIA acknowledges, therefore, that asbestos fibers released from damaged ductwork may have migrated throughout the ductwork, from the second floor to the ground floor. This is not only a theoretical possibility, but logically the result of Five Star's well-known failure to keep the building weather-tight for long periods during construction. See, e.g., BAA Letters to Five Star dated June 29, 2018; August 9, 2018; January 2, 2019 (misdated as 2018); March 25, 2019; and November 20, 2019. This caused rainwater and debris (as noted in Field Report 583) and wind to enter the unprotected ductwork, further spreading debris and material throughout the ductwork. If, as RIA concludes, it cannot be determined whether any asbestos fibers in the ductwork predated the project, this is the result of Five Star's failure to maintain a weather-tight building and protect the ductwork.

Travelers and Five Star are responsible for all damage to the fiberboard ductwork, and for all other damages arising therefrom, including without limitation the cost to replace the entire fiberboard ductwork system. Were it not for the damage to the ductwork, which resulted in the release and, together with Five Star's other negligent workmanship, migration of asbestos fibers throughout that system, replacement of the entire fiberboard ductwork system would not have been necessary.

The Town hereby demands that Travelers indemnify the Town in accordance with Section 3.18.1 of the General Conditions of the contract, which provides:

§ 3.18.1 To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, including claims, damage, loss or expense attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including the Work, caused in whole or in part by the negligent or wrongful acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. . . . [emphasis added]

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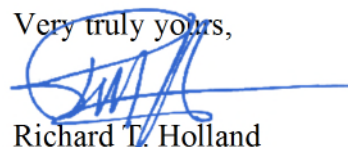
Furthermore, BCG's effort to blame the ductwork damage on the Town is made in bad faith, as is BCG's attempt to procure unwarranted adjustments to the contract time and contract price as a result of that damage. It is the Town's position that such conduct is an unfair and deceptive act and practice in violation of G.L. c. 93A by BCG, and tortious interference by BCG with the Town's contractual relationship with Travelers under the Takeover Agreement. While the foregoing conduct subjects BCG to direct claims from the Town, it is also imputable to Travelers. Therefore, BCG's conduct is an unfair and deceptive act and practice by Travelers under G.L. c. 176D and G.L. c. 93A. It is also a breach by Travelers of the Takeover Agreement and the covenant of good faith and fair dealing implied therein.

This letter is the Town's notice of the aforementioned claims against BCG, Travelers and Five Star, and the Town's 30-day demand for relief under G.L. c. 93A, § 9(3). Accordingly, in addition to its demand for indemnification, the Town hereby demands, pursuant to G.L. c. 93A, § 9(3), that Travelers, BCG, and Five Star pay all costs incurred by the Town to remove/replace the fiberboard ductwork, including without limitation all fees incurred for design, consultant and project management services. The Town reserves the right to seek treble damages under G.L. c. 93A from Travelers, BCG and Five Star.

Notwithstanding the foregoing, the Town shall charge to Travelers, or deduct from amounts payable to Travelers under the Takeover Agreement, all damages, costs and expenses, including attorneys' fees, arising from the ductwork damage. The Town shall also continue to assess liquidated damages for failure to substantially complete the work of the Takeover Agreement within the time required.

Further notwithstanding the foregoing, nothing said in or omitted from this letter, or in any communication by any representative or agent of the Town relating to the project, is a waiver of any rights, remedies or defenses of the Town, including without limitation those invoked in this letter, all of which are reserved.

Very truly yours,



Richard T. Holland

RTH/man

cc: Town Administrator (by electronic mail)
Assistant Town Administrator (by electronic mail)
Select Board (by electronic mail)

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**FIELD REPORT****Distribution:**TOS

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Project Name /Location: Sherborn Library**Field Report No: 583****4 Sanger Street, Sherborn, MA 01770****DTI Project #: 21505****Date:** 9/04/19**Time:** 9:00 AM**Weather:** Cloudy**Temp/Humid:** 60s – 80s
RH: 100 > 62**Present:** Five Star.

Observations/Notes: 1) The ambient exterior temperature at 7:00AM is 63°F. Forecasted high temperature is 81°F. The overnight low temperature is forecast to be 53°F. The ambient relative humidity is forecasted to decrease from around 100% to 62% by EOD and rise overnight to 93%.

Visitors:**Work in progress:****Five Star Construction:** The Superintendent is on site.**Five Star/Derenzo (Site Work):** On site. Preparing the trench for new granite curb at the Sanger Street parking area.

Redline (GWB): Not on site.

M-V Electrical: Not on site.

Rustic Fire Protection: Not on site.

LaPan (Plumbing): Not on site.

Superior Communications Services (IT): Not on site.

CJM (Tile Installer): Not on site.

Work Force:**Five Star**

1 – Superintendent
0 – Asst. Superintendent
0 – QC/PM Assistant
0 – Carpenter
0 – Laborer

FSBC (Site)

0 – Foreman
2 – Operators
2 – Laborers
0 – MECO

LaPan

0 – Foreman
0 – Plumber

Redline

0 – Foreman
0 – Carpenters
0 – Taper
0 – Plasterers

Rustic

0 – Foreman
0 – Pipe Fitter

CSI

0 – PM
0 – Foreman
0 – Laborer
0 – Coppersmith

Silkton

0 – PM
0 – Foreman
0 – Roofers
0 – Coppersmith

Eastfield**Glass Co.**

0 – PM
0 – Foreman
0 – Laborers

MV**Electrical**

0 – Foreman
0 – Electrician
0 – Apprentice

Snowden

0 – Foreman
0 – Pipe Fitters
0 – Sheet Metal
0 – Control Tech
0 – Insulator

CJM

0 – Foreman
0 – Tile Setter

DeBrino

0 – Foreman
0 – Journeymen

Temperature & Humidity Control:

Relative humidity levels in the Existing Building are: GF (66%, 62%), 1st Floor (61%), and 2nd Floor (53%, 52%). Relative humidity levels in the New Addition are: GF (61%) and 1st floor (61%).

Equipment Type	Location					Total	
	Existing Building			New Addition		O	NO
	GF	1 st Floor	2 nd Floor	GF	1 st Floor		
A. Heating & Cooling HP:							
AmeriCool WPH-4000	1/2*	2*	---	1*	---	1	5
B. Dehumidifier:							
Phoenix 250Max LGR	---	---	---	2	---	2	0
C. Air Scrubber:							
ACSI Phantom PH 2000	1/1*	---	3*	2*	1	2	6
D. Fans:	1*	---	2*	1*	---	0	4
Notes: 1) * = Not Operational. 2) O = Operational. 3) NO = Non-Operational.							

Equipment on Site:

1 – Genie S85 Boom Lift (FSBC)

1 – Skyjack 3219 Scissor Lift (FSBC)

1 – Generac Magnum Portable Generator (United Rentals-10775703) (FSBC)

Issues/Action Required:

#	Description	Action By	Date/Status
02	The wood valance above the existing library desk.	FSBC/Encore	Open 05/01/17
05A	Tree & Landscape protection required per drawings & specifications. Ongoing care required.	FSBC	Open 06/17/17
05C	A proper growing medium will need to be installed per arborist specification during backfilling in the areas around the trees where excavation cut through the root system. BAA has provided ASI-14 (11/13/17) to FSBC with modified backfill instructions.	FSBC	Open 10/01/17
05D	Rock pile on top of 50" Oak root system at East side of the building (Sanger St) needs to be removed w/out further impact to root system. See Spec. Sec 311000, 1.3 and 3.3.1. See BAA/GIA Field Reports.	FSBC	Open 06/17/17
12	Water penetration into the 1 st floor Connector Lobby ceiling in the existing building caused warping and staining of the wood ceiling boards. Remedial action is required. Tests completed Robert Mussey Associates (5/22/18). Remediation strategy not yet completed.	BAA/ FSBC	Open 3/07/18
13A	Per RDK/NV5 Engineers 3/28/18 Field Report – The installed VRF units on the 1st floor of the new addition that may have been affected by water leakage from the roof. RDK recommends that the units be tested to ensure they are operating properly prior to the ceiling/soffit being installed and to confirm in writing that the unit manufacturer will still honor the unit warranties.	Snowden/ FSBC	Open 4/05/18

13B	Per RDK/NV5 Engineers 6/15/18 Field Report – It was observed that the existing floor registers on the first floor have not been protected from damage and are extremely dirty. Also, there is concern that water and/or construction debris may have migrated down into the ductwork below. Note: Floor registers are now covered but the interior of ducts shall be cleaned and protected.	FSBC	Open 6/15/18
13C	Per RDK/NV5 Engineers 6/15/18 Field Report – It was observed that some of the existing duct board in the crawl space adjacent to the new Director's Office (Rm 205) has been damaged and shall be replaced.	FSBC	Open 6/15/18
13D	The existing duct board in the crawl space adjacent to the North-side 2 nd floor hallway in the Existing Building (inside the access doors) has been damaged (see photo 0670 in the May 15 FR #509 and photos 2216 & 2217 in July 23 FR #553).	FSBC	Open 5/17/19
15	TH Parking Paving - Asphalt Density Test Locations: Nine (9) pavement nuclear density tests were conducted on 4-Dec-17 by JTC on the newly paved areas. Four (4) of the nine tests did not meet the specified standard. FSBC to re-test affected area prior to starting of CPR-10/CR 17R3(4) work. JTC core sampled on 7/26. Core density tests result received and failed to meet standard. Binder to be removed and replaced. See GIA comments on HMA Pavement Density Report dated 4/18/18.	BAA/GIA/ FSBC	Open 5/04/18
16	RDK/NV5's Field Report dated 3/07/18 noted that the 8' lighting fixture at the GF Service Entry will not fit due to height restraints or obstructions. There also appears to be an egress height issue in this space. RFI-194 issued. Note: Final fixture locations shall be verified and coordinated with the Architect in the field.	BAA	Closed 04/01/19
17	Door frame (012-1) on GF at connector hallway near elevator hoistway was damaged/bent during delivery of tile. Note: Verify door fit and condition of jamb during installation.	FSBC	Closed 04/01/19
21	Water appears to have gotten under the new insulation and Sarnafil PVC membrane cover installed on the Elevator Connector roof. Note: Connector roof installation has been rejected by BAA.	FSBC	Open 8/21/18
23	Water was getting under the new roof build-up on the Existing Building at a few locations. See FR #351. Note: Observation will continue until all roof tile, flashing, and water pressure testing is completed.	FSBC	Closed 04/01/19
24	Water continues to infiltrate the Ex. Building at both the East and West end chimneys. See FR #346, #351, #357. Note: Observation will continue until all roof tile, flashing, and water pressure testing is completed. Water pressure testing on 7/19 (FR #551) revealed water infiltration into the building at both the East (Sanger Street) and West chimneys of the Existing Building.	FSBC/CSI/ Silktown	Open 07/20/19

28	The insulation board installed between the brick/granite band and the foundation wall on the 1-line, the M-line, and the 6.9-line need to be physically adhered/attached to maintain permanent physical contact with the foundation wall. Note: The exterior masonry work has been rejected by BAA pending the result of As-Built survey results.	FSBC/CSI	Closed 04/01/19
29	The west-side Soffit of Nora's Tree House is incorrectly sized and will not accommodate the wall build-up. The East and West soffit overhang at the gable end are not equal. The brick veneer wall below may also not align in plane with the intended finish wall.	FSBC/CSI	Open 03/26/19
30	The installed location of the interior LMG stud wall in Nora's Tree House does not appear to accommodate the spray-on fire proofing on the building's steel frame structure and creating a conflict with the GWB. To be verified by the GC.	FSBC	Open 03/26/19
31	A tar-like substance is leaching from under the copper flashing where the Sarnafil and asphalt roof join and is streaking down the Sarnafil roof. See FR #557, photo #2094 thru 2097.	FSBC/ Silktown	Open 07/29/19

Punch List (Unfinished Items):

#	Description	Action By	Date/Status
01B	Shock vibration pads for DOAS-1 and ACCU-1 units need to be welded/bolted to the roof-top steel frame. See BBC Field Reports.	FSBC/Sub	Open 7/19/18
06	Repair of waterproofing membrane on Line 6.9 foundation wall. Reviewed on site with Grace Representative, DeBrino, and FSBC 3/05/18. Grace to submit a narrative opinion. Narrative report received (3/26) but not yet acceptable.	FSBC/ DeBrino	Open 3/05/18
07A	Per BDK/NV5 Engineers 3/28/18 Field Report: The sprinkler pipe in the Main Electrical room appears to be installed directly over electrical equipment in violation of the Mass. Electrical Code. Rustic to revise.	FSBC/Rustic	Open 4/5/18
07B	At the end of the HVAC duct at the NW corner of the GF of the Existing Building, the sprinkler head is in contact with the duct and needs to be moved.	FSBC/Rustic	Closed 5/20/19
10	Per BCC Field Report dated 8 Apr 19 (Site Visit #33) address open items and review with J. Balmer after work is completed and prior to closing up the work area.	FSBC/ BCC/BAA	Open 5/01/18
12	Chinker stones have fallen out of the new stone retaining wall at the SPD/TH parking area and need to be re-installed. Many others are loose. The wall needs to be inspected.	FSBC/Mason	Open 01/01/19
14	On the east face of the West chimney the lowest brick course that remained during the removal of brick has a broken bond and separated from the brick above. This would be a source of leakage. See FR-482 (04/04/19) photos 9446, 9447, and 9450.	FSBC/CSI	Open 04/18/19

Report prepared by: Just Moller

This report is written as a status report only and does not warrant the work inspected nor does the inspection intend to relieve any party of responsibility or the need to use due diligence and sound practice in the construction of this project.



05/14/2019