

Proving and Defending Claims Related to the Quality of Work

Ellen Cavallaro, Berkeley Surety Group

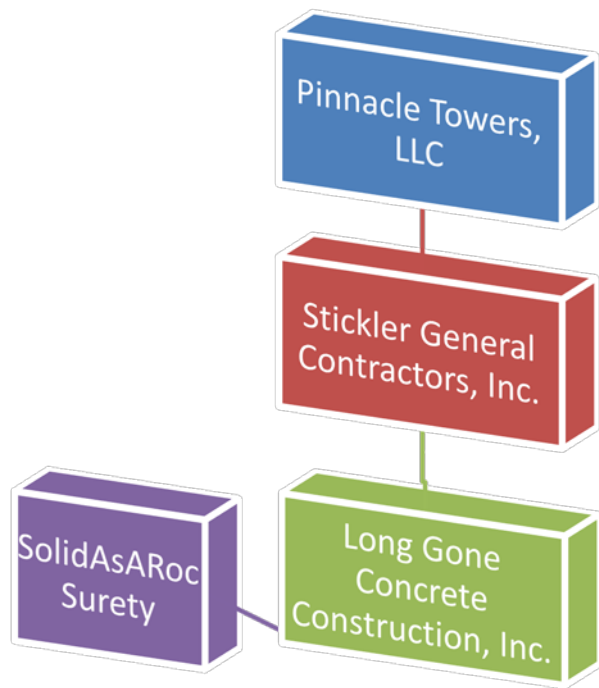
Mike Sugar, Forcon International

Shannon Briglia, BrigliaMcLaughlin, PLLC

Presentation Format

- Series of Vignettes based upon a fictional highrise luxury apartment project in downtown Metropolis
 - Brief factual background
 - Identification and discussion of issues
 - Interactive – audience participation desired

(fictional) Pinnacle Towers Project



Long Gone's Required Payment and Performance Bonds

- Bond # 8675309
- Standard Form
- Several Modifications

FSLC Spring Meeting 18



AIA Document A312™ – 2010

Performance Bond

CONTRACTOR:

(Name, legal status and address)

Long Gone Concrete Construction, Inc.
16 Skid Row
Metropolis, FL

OWNER:

(Name, legal status and address)

Stickler General Contractors
111 A Avenue East
Metropolis, FL

CONSTRUCTION CONTRACT

Date: February 29, 2013

Amount: \$53,328,882.67

Description:

(Name and location)

Pinnacle Towers Concrete Frame

SURETY:

(Name, legal status and principal place

of business)

Solid As A Roc Surety
One Steadfast Way
Middletown, NJ

ADDITIONS AND DELETIONS:

The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

Any singular reference to Contractor, Surety, Owner or other party shall be considered plural where applicable.

BOND 8675309

Date: March 17, 2013

(Not earlier than Construction Contract Date)

Amount: \$ 53,328,882.67

Modifications to this Bond:

☒

None

☐

See Section 16

CONTRACTOR AS PRINCIPAL

Company:

(Corporate Seal)

Long Gone Concrete Construction, Inc.

Signature:

Name and B. Madoff

Title:

(Any additional signatures appear on the last page of this Performance Bond.)

SURETY

Company:

(Corporate Seal)

Solid As A Roc Surety

Signature:

Name and B. Steady

Title:

(FOR INFORMATION ONLY—Name, address and telephone)

AGENT or BROKER:

OWNER'S REPRESENTATIVE:

(Architect, Engineer or other party:)

Fly High Architects, Ltd.
1600 Miracle Mile
Metropolis, FL

Int.

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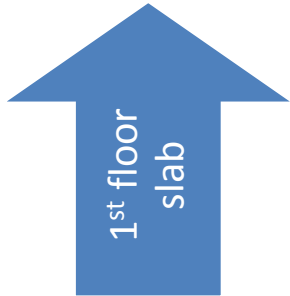
User Notes:

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Vignette I



18 inches short



- Concrete frame completed on schedule
- After topping off, discovered that 2nd floor slab poured at 18'6" above 1st floor slab instead of required 20'
- Large generator and dumpster won't fit as designed on first floor
- Notice of Deficiency issued

Vignette I



- Sole Owner of Long Gone absconds to Tibet
- Stickler gives notice of intent to terminate and demands meeting with SolidAsARoc
- Stickler and Pinnacle want the concrete frame rebuilt

Vignette I – The Intake Meeting

Vignette II



- Surety and consultant conduct site visit and collect documents
 - Curtainwall panels are being installed
 - MEP rough-in underway
- Meet with Stickler and A/E
- Consultant studies docs and interviews key personnel

Vignette II

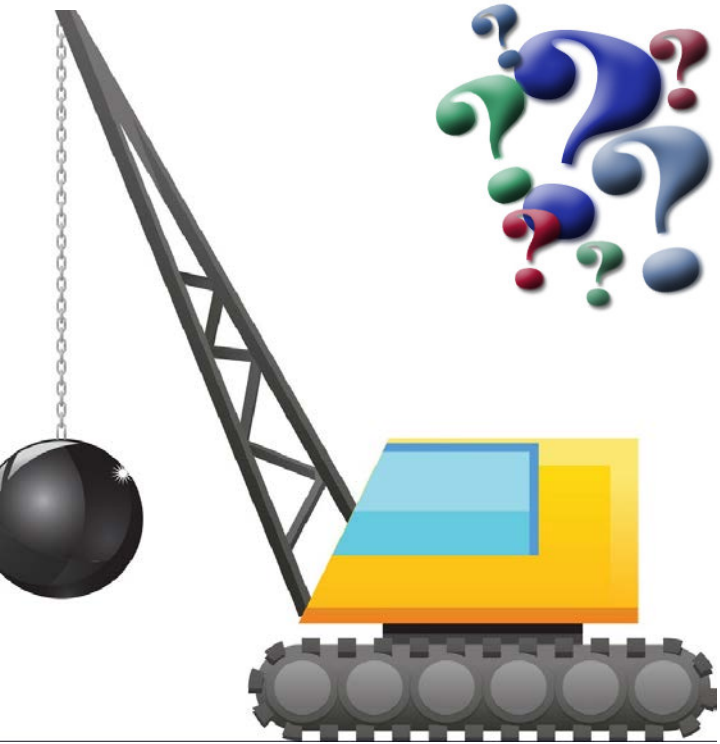


- Consultant determines financial status of subcontract
 - Requisitioned 95%
 - Paid 85%
- Learns inspector is Long Gone's owner's cousin

Vignette II –

Post-site Meeting Strategy Session

Vignette III



- Economic Waste Analysis
 - Cost of tear down/rebuild
 - Other options & cost
 - Buy apartment on 2nd floor over service areas and cut slab
 - Install generator & dumpster outside
 - Owner demands strict performance
 - Looking at penal sum loss

Vignette III



- Perform or Deny based on Economic Waste doctrine and acceptance of Patent Defect
 - Litigation costs
 - Additional Defective work?
- Leverage to convince Owner to accept work-around
- Considerations for settlement

Vignette III –

Issues for Negotiation with Obligee (and Owner)

Vignette IV



- 10 Years Later
- Demand on performance bond from Stickler - leaky curtainwall
 - Concrete slabs poured out of tolerance
 - Causing curtainwall leaks
- Everyone remembers Long Gone's totally defective work

Vignette IV

§ 7 If the Surety elects to act under Section 5.1, 5.2 or 5.3, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract. Subject to the commitment by the Owner to pay the Balance of the Contract Price, the Surety is obligated, without duplication, for

- 1 the responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;
- 2 additional legal, design professional and delay costs resulting from the Contractor's Default, and resulting from the actions or failure to act of the Surety under Section 5; and
- 3 liquidated damages, or if no liquidated damages are specified in the Construction Contract, actual damages caused by delayed performance or non-performance of the Contractor.

§ 8 If the Surety elects to act under Section 5.1, 5.3 or 5.4, the Surety's liability is limited to the amount of this Bond.

§ 9 The Surety shall not be liable to the Owner or others for obligations of the Contractor that are unrelated to the Construction Contract, and the Balance of the Contract Price shall not be reduced or set off on account of any such

§ 11 Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after a declaration of Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.

Contract after all proper adjustments have been made, including allowance to the Contractor of any amounts received or to be received by the Owner in settlement of insurance or other claims for damages to which the Contractor is entitled, reduced by all valid and proper payments made to or on behalf of the Contractor under the Construction Contract.

§ 14.2 **Construction Contract.** The agreement between the Owner and Contractor identified on the cover page, including all Contract Documents and changes made to the agreement and the Contract Documents.

§ 14.3 **Contractor Default.** Failure of the Contractor, which has not been remedied or waived, to perform or otherwise to comply with a material term of the Construction Contract.

§ 14.4 **Owner Default.** Failure of the Owner, which has not been remedied or waived, to pay the Contractor as required under the Construction Contract or to perform and complete or comply with the other material terms of the Construction Contract.

§ 14.5 **Contract Documents.** All the documents that comprise the agreement between the Owner and Contractor.

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Vignette IV

• Parties modified the

§ 11 Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after a declaration of Contractor Default ~~or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first.~~ If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.

language from Paragraph 11

§ 7 If the Surety elects to act under Section 5.1, 5.2 or 5.3, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract. Subject to the commitment by the Owner to pay the Balance of the Contract Price, the Surety is obligated, without duplication, for

- 1 the responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;
- 2 additional legal, design professional and delay costs resulting from the Contractor's Default, and resulting from the actions or failure to act of the Surety under Section 5; and
- 3 liquidated damages, or if no liquidated damages are specified in the Construction Contract, actual damages caused by delayed performance or non-performance of the Contractor.

§ 8 If the Surety elects to act under Section 5.1, 5.3 or 5.4, the Surety's liability is limited to the amount of this Bond.

§ 9 The Surety shall not be liable to the Owner or others for obligations of the Contractor that are unrelated to the Construction Contract, and the Balance of the Contract Price shall not be reduced or set off on account of any such unrelated obligations. No right of action shall accrue on this Bond to any person or entity other than the Owner or its heirs, executors, administrators, successors and assigns.

§ 10 The Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations.

§ 11 Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in

or to be received by the Owner in satisfaction of discharge of other claims for damages to which the Contractor is entitled, reduced by all valid and proper payments made to or on behalf of the Contractor under the Construction Contract.

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Vignette IV



- Substantial completion 10+ years ago
 - SOL for breach of contract = 5 yrs
 - SOL on bonded contracts = 12 yrs
 - Statute of Repose = 10 yrs

Vignette IV –

Privileged Internal Discussion About Surety's Exposure for Post Substantial Completion Defects

End of Presentation