



# PINPOINT WEBINAR

November 30, 2021

Thanks for joining us a few minutes early.

**We will start promptly at 2 p.m.!**

## MUST HAVE CONTRACT PROVISIONS

*... a conversation with **Stephen Phillips**,  
Hendrick, Phillips, Salzman & Siegel, P.C.*



# Agenda

- ↪ 2:00 | Start Program and Webinar Housekeeping Items  
*Debbie Hathorne, CRA Executive Director*
- ↪ 2:02 | CRA Announcements & Speaker Intro  
*Debbie Hathorne, CRA Executive Director*
- ↪ 2:05 | Contract Provisions Legal Update  
*Stephen M. Phillips, Esq,*  
*Hendrick, Phillips, Salzman & Siegel, P.C.*
- ↪ 3:15 | Q & A

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# Webinar Courtesies:

- ★ Thank you for being on-time.
- ★ All attendees are muted.
- ★ Use the Q&A at the bottom your screen to send your questions to Debbie. She will relay them to the speaker(s).
- ★ We will not use the raise hand function, please use Q & A.
- ★ Links and other information will be sent in Chat box if applicable. Otherwise, the chat function is limited and prefer you to use Q&A.
- ★ Due to the number of participants, we may not get to all the questions, but we will try.
- ★ Final note, in order to earn CIU credit, you will be required to answer a final poll question at the end of today's presentation.



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# CRITICAL CONTRACT PROVISIONS FOR ROOFING CONTRACTORS DURING CHALLENGING TIMES



November 30, 2021

*Prepared by:*

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# Construction Law = Contract

- Construction law is contract law. The parties to the contract largely draft the “law” that will govern the project and their relationships, obligations, rights, remedies and responsibilities when they formulate the contract.
- A successful contractor is one that not only is knowledgeable and skilled in estimating, installing and managing their work, but also is knowledgeable and diligent in contract formation and negotiation.



# Be Pro-Active in Contract Formation

- View critically contracts that are submitted to you to execute
- Identify and establish your fundamental principles that should be included in the contract or excluded. Some possibilities:
  - a) Extent of indemnification
  - b) Schedule – time to perform
  - c) No personal guarantee
  - d) Entitled to same rights and remedies as the general contractor
  - e) Liability for attorney's fees



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# To Put Yourself in a Position to Negotiate...

Include in all your proposals (other than public bids where you are bidding directly to a public owner):

“This proposal is based on execution of a standard AIA construction contract such as AIA Document A401.”



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# Be Vigilant

- Look out for provisions in bid packages and project manuals that include a general contractor's standard subcontract and/or state that in submitting a proposal or bid you agree to execute the general contractor-drafted subcontract
- Especially look out for and do not agree to execute general contractor drafted performance and payment bonds



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# Different Contracts...but they all deserve attention and can have severe consequences affecting liability and profitability.

- New construction subcontracts with general contractors
- Re-roofing contracts with building owners
- Subcontracts you consummate with subcontractors
- Approved applicator agreements with roofing manufacturers
- Purchase orders and credit agreements you execute with suppliers and distributors
- Performance and payment bonds



# Performance Bonds

- Make sure all performance bonds you sign include a time limitation governing how long after completion of construction you can be sued on the performance bond
- AIA Document A312 Performance Bond requires that any legal proceeding under the bond must be instituted within two (2) years after a declaration of Contractor Default or, within two (2) years after the contractor ceased working or within two (2) years after the Surety refuses or fails to perform its' obligation under the bond, **whichever occurs first**
- Colorado law allows contracting parties to stipulate to a shorter period of time then prescribed by the applicable statute of limitations as long as the period is reasonable



# Payment Bonds

- Seek to limit the class of persons or entities who can make a claim on your payment bond to those with whom you have a contract and no more than one tier further down (e.g., supplier to your subcontractor)
- AIA Document 312 Payment Bond limits claimants to those who have a direct contract with the contractor or with a subcontractor of the contractor or have rightfully asserted a mechanics lien claim
- Request written notice to you no later than 60 or 90 days after last furnishing labor or material by the claimant with whom you do not have a direct contract



# Critical Issues: Address These In Contract Provisions

1. Price of roofing materials during a period of price volatility, continued price increases and manufacturers stating price is the price in effect on date of shipment.
2. Liability for delay damages and liquidated damages in today's marketplace when there is uncertainty when materials will be available, and lengthy and unpredictable delays in material delivery.
3. Liability and acceptability of roof decks.
4. Reasonable, not over broad, indemnification obligations.
5. Design liability



# Critical Contract Provisions

6. Risk of loss and builder's risk and installation floater insurance policies.
7. Ability to hold your subcontractors and suppliers accountable if you are damaged due to fault by them.
8. Having same rights and remedies available to you as general contractor has toward the owner.
9. Payment: right to receive, contingent payment, right to stop work if not paid.
10. Limitation on remedies; ability to recover damages, disclaimers.



# Critical Contract Provisions

11. Notice requirements. Waiver of claims.
12. Right to examine your subcontractor's insurance policies, particularly CGL insurance for non-standard exclusions (e.g. open roof, torching, residential, heating of materials)
13. Dispute resolution: locale, arbitration vs. litigation, consolidation
14. One-sided attorney's fees recovery.
15. Opportunity to cure alleged defects.



# Material Prices in Effect on the Date of Shipment

At the present time, roofing material manufacturers are unwilling to commit to firm prices or delivery dates of numerous roofing materials, including but not limited to fasteners, adhesives, polyisocyanurate insulation and TPO membrane. Roofing materials manufacturers state that the price of the materials will be the price in effect on the date of shipment. Accordingly, the parties acknowledge and agree the contract sum to be paid to Roofing Contractor will not be finally determined until the time the materials are shipped.

Roofing contractor will be entitled to an equitable adjustment for increases in the price of materials paid by roofing contractor upon documentation of the price increases above the prices stated in the attached schedule of material prices upon which our proposal/contract price is based





# Increase in Material Prices

The roofing industry is experiencing substantial volatility in material prices, material price escalation, material delays and material unavailability particularly for steel products, screws, plates, fasteners, polyisocyanurate insulation and TPO and other roof membrane products. If the cost incurred by the Roofing Contractor to purchase a material specified, needed or approved for this job increases by \_\_\_\_% or more from the prices upon which this contract is based and the prices paid by the Roofing Contractor, the Roofing Contractor shall be entitled to an equitable adjustment of the contract sum equal to the additional cost incurred by the Roofing Contractor to obtain the materials. Roofing Contractor is to provide written notice to customer upon learning of the price increase and provide documentation of the price of the material as of the date of this contract and the revised price.



# Price Escalation Provision

- If the price charged to the Roofing Contractor for any materials to be used in the Roofing Contractor's work increases by \_\_\_\_ percent or more from the price in effect and relied upon by Roofing Contractor in preparing and submitting this proposal/contract, then the Owner/General Contractor agrees that the proposal/contract price shall be increased to this same extent upon Roofing Contractor's submitting documentation thereof.



# Escalation & Delays

## Provision to be Included in Proposals to Owners or General Contractors

- Due to continuing increases in prices of materials, shortages and material delivery delays, the price(s) provided in this proposal is/are subject to change, and the Roofing Contractor shall be afforded additional time if material delivery is delayed.



# Delays in the Delivery of Roofing Materials

Because of lengthy, uncertain and unknown delays in the delivery of roofing materials by roofing material manufacturers, Roofing Contractor shall not be liable for delay damages or liquidated damages resulting from delays in the delivery of the roofing materials. Roofing Contractor shall have \_\_\_\_ workdays with conditions suitable for roofing installation to obtain substantial completion of the roof once the requisite materials have been delivered to the Roofing Contractor.



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## Force Majeure, Including Potential Price Escalation

The roofing industry is currently experiencing continuous material price increases, shortages and delays in obtaining roofing materials such that reliable assurance of material availability, timely delivery and firm pricing of materials cannot be obtained. The parties acknowledge that some of the materials and products to be installed in the construction of the Project are likely to be unavailable, delayed in shipment and/or subject to price increases due to circumstances beyond the control of the Roofing Contractor. If specified materials are unavailable or shipment is delayed, Roofing Contractor shall provide written notice to Owner/General Contractor and shall be afforded additional time and substitute products may be considered. If there is an increase in price of materials, equipment or products between the date of this Agreement and when the materials are available at the Project, the Contract Sum shall be increased to reflect the additional cost to obtain the materials, provided that the Roofing Contractor provides written notice and documentation of the increased costs.



# Force Majeure Clause – AIA Provision

AIA Document A201-2017

§8.3 Delays and Extensions of Time

§8.3.1 If the Contractor is delayed at any time in the commencement of progress of the Work by (1) an act or neglect of the Owner or Architect, or an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, **unusual delays in deliveries**, unavoidable casualties, adverse weather conditions documents in accordance with Section 15.1.6.2, or **other causes beyond the Contractor's control**; (4) by delay authorized by the Owner pending mediation and binding dispute resolutions; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.



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# Force Majeure Clause

AIA Document A201-2017

§8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§8.3.2 This Section does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

- Force Majeure clauses usually only provide for an extension of time, not additional compensation. A price escalation clause is needed for material price increases.



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# Federal Government Contracting

- § FAR 48 C.F.R. § 16.203-2

Permits inclusion of economic price adjustment clauses in fixed-price contracts in situations “when (i) there is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance, and (ii) contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract.”

The Contracting Officer has the discretion to include this clause in contracts. Contractors contemplating working on government projects should request that this provision be included in the contract documents.





# Indemnification

Limit scope of indemnification obligation

Insert this language in every indemnification provision:

...**to the extent** caused by a **negligent** act or omission of Roofing Contractor or someone for whose acts Roofing Contractor is responsible,



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# Acceptance of Deck

Roofing Contractor's commencement of roof installation indicates only that Roofing Contractor has visually inspected the surface of the roof deck for visible defects. Roofing Contractor is not responsible for the structural sufficiency, quality of construction, undulations, fastening or moisture content of the roof deck or other trades' work or design and their effect on the roof and roofing materials.



# Structural Sufficiency of Deck

Customer warrants that structures on which Roofing Contractor is to work are in sound condition and capable of withstanding roof construction, equipment and operations.



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# Debris and Openings in the Roof Deck

General Contractor shall provide Roofing Contractor with a roof deck that is free and clear of all debris, ready and suitable to receive roofing materials, and with any and all openings properly covered, secured and labeled in accordance with applicable OSHA standards prior to general contractor requesting roofing subcontractor to proceed with the loading of roofing materials and roofing installation.



# Properly Covering Holes

Unprotected and inadequately secured covers over openings in a new roof deck or a deck under construction present potentially deadly hazards to roofing personnel and all others walking or working on the roof deck. The General Contractor will require all trades making openings in the deck to properly cover, secure and label all deck openings in accordance with OSHA regulations at the time the opening is made.



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# Condensation, Drainage and Ponding

Roofing Contractor is not responsible for condensation, moisture migration from the building interior or other building components, location or size of roof drains, plumbing code compliance, adequacy of drainage or ponding on the roof due to deck or structural conditions.



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# Moisture in Roof Decks

Customer acknowledges that Roofing Contractor has notified Customer of the potential for moisture from lightweight and/or structural concrete roof decks to cause moisture within the roofing system and failure of adhesives in the roofing system to bond to wet, damp or inadequately cured lightweight and/or structural concrete decks. Roofing Contractor is not responsible to test or assess moisture content of the deck or substrate. Roofing Contractor is not responsible for moisture from the deck or interior affecting the roofing materials.



# Risk of Loss

- Do not accept full risk of loss regardless of cause
- Provide for builder's risk or installation floater insurance
- Limit risk of loss to causes within your control





# Insurance – Builder’s Risk

Customer shall purchase and maintain builder’s risk and property insurance, including the labor and materials furnished by Roofing Contractor, covering fire, wind storm, extended coverage, malicious mischief, vandalism and theft on the premises to protect against loss or damage to material and in-place work until the job is completed and accepted by the Owner.



# Damage to Roofing

General Contractor shall coordinate the Project so that the Project proceeds in an orderly and customary manner and so as to avoid newly installed roofing being used as a surface for on-going construction work. If Roofing Contractor's work is damaged by other trades, General Contractor agrees to backcharge the trades causing the damage. General Contractor will purchase or arrange with Owner to maintain Builder's Risk insurance.



# Schedule

Roofing Contractor shall have a minimum of \_\_\_\_\_ workdays with conditions suitable for roofing work after the requisite materials have been delivered to obtain substantial roof completion.



# Design & Building Codes

If Roofing Contractor discovers that the prescribed Work is not in accordance with codes, Roofing Contractor will promptly notify Contractor and await direction from Contractor and Design Professional. The Design Professional is responsible to design the Work to be in compliance with applicable codes and regulations and to specify or show the work that is to be performed. Roofing Contractor is not responsible for design, including design errors or omissions.



# Contingent Payment

If Roofing Contractor has performed its work but Owner does not make payment to Contractor for some reason unrelated to Roofing Contractor such as a problem or dispute with Contractor or another trade, Roofing Contractor shall be entitled to payment.



# Payment

If Roofing Contractor is not paid, Roofing Contractor shall be entitled to interest at the rate of \_\_\_% per month, plus costs of collection including attorney's fees. Roofing Contractor shall not be required to continue to work and warranty shall be ineffective if Roofing Contractor is not paid in full.



# Contract Rights & Remedies

Roofing Contractor shall have the benefit of all rights and remedies toward the Contractor as the Contractor has toward the Owner.



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## Interior Protection

Customer acknowledges that re-roofing of an existing building may cause disturbance, dust, debris or fireproofing to fall into the interior. Customer agrees to remove or protect property directly below the roof in order to minimize potential interior damage. Roofing contractor shall not be responsible for disturbance, damage, clean-up or loss to interior property that Customer did not remove or protect prior to commencement of roofing operations. Customer shall notify tenants of re-roofing and the need to provide protection underneath areas being re-roofed. Customer agrees to hold Roofing Contractor harmless from claims of tenants who were not so notified and did not provide protection.





# Asbestos & Existing Conditions

Roofing Contractor's price and this contract are based upon Roofing Contractor's not coming into contact with asbestos or asbestos-containing or toxic materials at Owner's building. If asbestos or asbestos-containing or toxic materials are encountered, the contract price and time to complete the contract will be adjusted based upon the additional costs and time resulting from the presence of asbestos or toxic materials in the building. Roofing Contractor is not responsible for damages or leaks due to existing conditions or existing sources of leakage simply because Roofing Contractor started work on a building or performed repair work.



# Dispute Resolution

If a dispute shall arise between Roofing Contractor and Customer with respect to any matters or questions arising out of or relating to this Agreement or the breach thereof, Roofing Contractor and Customer will seek to mediate the dispute. If mediation is not successful, arbitration shall be administered by and conducted in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association unless the parties mutually agree otherwise. Any legal claim against Roofing Contractor alleging any breach of this contract or negligence by Roofing Contractor must be initiated no later than \_\_\_ years after Roofing Contractor performed the roofing installation covered by this contract.



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# Pricing from Manufacturer

Roofing materials manufacturer shall sell materials to Applicator in accordance with the prices quoted to and relied upon by Applicator for the job in question. Manufacturer reserves the right to change its price lists at any time, but in the event of an increase in the price applicable to orders already placed by Applicator, Manufacturer will honor the price quoted by Manufacturer to Applicator if Applicator has submitted a bid or proposal or entered into a contract based upon that price.



## Liability for Defective Materials

Manufacturer warrants its material to be free from defects and to perform as represented by Manufacturer. Manufacturers shall be liable to Roofing Contractor in the event of defective materials or failure of materials to perform as represented by manufacturer for expenses and damages reasonably suffered by Contractor resulting from defective materials or the failure of materials to perform as represented, including the costs to remove and replace the defective materials.



## Manufacturer Indemnification

Manufacturer shall indemnify and save Applicator harmless from all damages, losses or expenses, including reasonable attorney's fees, including any settlement of any claim (subject to Manufacturer's approval, which shall not be unreasonably withhold), to which Applicator may be subjected to resulting from Manufacturer's negligence or failing to perform its obligations under the limited warranty, defects in Manufacturer's materials or specifications or failure by Manufacturer to honor its warranty obligations or a misrepresentation by Manufacturer.



# Dispute Resolution

In the event of a dispute, the parties will seek to mediate the dispute. If mediation is unsuccessful, the parties agree to arbitrate the dispute in an expeditious and economic manner. If either Applicator or Manufacturer has been named in the civil litigation or another dispute resolution proceeding, the party who has been named may include the other party in accordance with the normal rules applicable to such proceedings regardless of this agreement to arbitrate disputes between Applicator and Manufacturer. The intent of this provision is for Manufacturer and Applicator to be able to join the other party so that all claims can be resolved in one legal proceeding.



## Duration of Roofing Contractor Liability

Allow Manufacturer, at Manufacturer's option, to inspect Roofing Systems at anytime during and at the expiration of the Applicator's two (2) year repair period, and cause Applicator to make repairs due to a deficiency by Applicator at Applicator's expense. At the end of the two (2) year period, Applicator shall have no further obligation to make repairs at is expense, provided Applicator has performed the repairs requested by Manufacturer at roof installation completion, during the first two years and following the two-year inspection if undertaken by Manufacturer.



# Manufacturer Liability

Manufacturer warrants its materials to be free from defects and fit for their intended purpose of serving as roofing materials. Manufacturer's liability and Applicator's remedies are to cover replacement of defective material, labor costs incurred by Applicator to remove and replace defective and damaged material and damages sustained by Applicator resulting from defective material supplied by Manufacturer. If Applicator is liable for damages owed to a third party, such as its customer, because of Manufacturer's defective material, Manufacturer will be liable to Applicator for reimbursement of all such damages.





## Commercial General Liability

Roofing Contractor shall carry commercial general liability (CGL) insurance written on an occurrence basis using a standard Insurance Services Office commercial general liability form (1988 or equivalent) and including contractual liability, products/completed operations and no limitation for explosion, collapse, residential structures, water damage and underground hazards.

Limits of:

\$2,000,000 Bodily Injury and Property Damage Combined Per Occurrence

\$2,000,000 Bodily Injury and Property Damage Combined Aggregate

There shall be no exclusions or coverage limitations applicable to water damage, and no exclusions for open roof claims, torching, roofing, heating of materials, and no residential or habitational exclusions.



## Subcontractor's Insurance Policies

Subcontractor shall provide to Roofing Contractor a certificate of insurance, using a standard ACCORD form, prior to commencement of Work. Subcontractor shall provide copies of required insurance policies, including all endorsements, when requested by Roofing Contractor. Subcontractor shall not be entitled to payment unless the requisite Certificates of Insurance and required insurance policies, when requested, have been received. Insurance coverage shall be continuously maintained, and Subcontractor shall provide renewal evidence at least ten (10) days prior to policy expiration. The "Name of Person or Organization" section should list all the Additional Insured parties, but failure to do so shall not affect additional insured status or the obligation of Subcontractor to make other parties additional insureds.



## Additional Insured

Roofing Contractor, General Contractor, Owner and any other parties whom Roofing Contractor is required to name as additional insureds shall be named as additional insureds on Roofing Contractor's commercial general liability, pollution, automobile liability and excess umbrella liability insurance policies. The forms of Additional Insured coverage shall be CG 20 10 (07/04) or CG 20 33 (07/04) and CG 20 37 (07/04). Additional insured coverage shall apply to completed operations.



# Subcontractor's Failure to Perform

If Subcontractor fails to perform its obligations in a good, satisfactory and timely manner, Roofing Contractor shall be entitled to take such steps as are necessary to protect Roofing Contractor's interests, including supplementing Subcontractor's workforce, requiring Subcontractor to increase its workforce, making payment to materialmen and others who are to be paid by Subcontractor, requiring Subcontractor to work overtime and on weekends, and reducing Subcontractor's scope of Work. Roofing Contractor shall be entitled to deduct from moneys otherwise owed to Subcontractor expenses and damages suffered by Roofing Contractor resulting from Subcontractor's unsatisfactory or untimely performance. Subcontractor shall reimburse Roofing Contractor for additional expenses incurred by Roofing Contractor resulting from Subcontractor's unsatisfactory or untimely performance, including attorneys' fees incurred by Roofing Contractor.



# Take Aways...

- Read all contracts you are requested to sign. If you don't have the patience to review and evaluate a contract, have someone else do so on your behalf.
- Do not agree inadvertently to the terms of a general contractor-drafted subcontract or performance and payment bonds by submitting a proposal without taking exception: state that your proposal is based on execution of a standard AIA contract.
- Don't be hesitant to negotiate contract provisions with owners, general contractors and manufacturers.
- Use contracts affirmatively to manage and limit your liability and address situations that arise in roof construction.





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YEARS OF SERVICE

# Final comments:



- ★ Thank you Stephan!
- ★ Presentation was shared in the Chat and is available at:  
<https://www.coloradoroofing.org/member/education>
- ★ A survey will be sent after the seminar, please take the time to respond. Your feedback helps us plan future webinars and seminars.
- ★ Thank you for staying on the webinar the full time. **Please answer this final poll question to earn your CIUs.** Then, you are free to hop off and end your session.

# Thank You for attending!