



**THE MOST IMPORTANT CONTRACT
PROVISIONS TO CHECK OR ADD IN
CONTRACTS YOU ARE ASKED TO SIGN**

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CONTRACT PROVISIONS ROOFING CONTRACTORS SHOULD SEEK TO INCLUDE IN THEIR CONTRACTS

- Provisions applicable to all roofing contracts
- Provisions applicable to new construction projects
- Provisions applicable to re-roofing projects

CRITICAL CONTRACT PROVISIONS APPLICABLE TO ALL ROOFING CONTRACTS

**PROVISIONS TO LOOK OUT FOR
IN CONTRACTS YOU ARE
ASKED TO SIGN DRAFTED BY
OTHERS**

PERSONAL LIABILITY

- Look out for a provision somewhere in the contract that makes the person who signs the agreement personally liable
- Be sure signature blocks are clear that the person signing the agreement is doing so as a representative of the corporation or limited liability company and not personally
- Carefully review credit agreements with distributors

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,

INDEMNIFICATION

- Seeks to limit to bodily injury and property damage claims
- Bodily injury and property damage claims are covered by commercial general liability insurance

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.

CONDENSATION AND DRAINAGE

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

INSURANCE –ADDITIONAL INSURED

Naming General Contractor and Owner as additional insureds on Roofing Contractor's liability insurance policy is intended to apply only to the extent that a negligent act or omission by Roofing Contractor causes a claim to be asserted or a loss to be sustained by General Contractor or Owner. The additional insured endorsement is not intended and shall not be construed to cause Roofing Contractor's insurer to be liable either to defend or to indemnify General Contractor or Owner for claims against or losses sustained by General Contractor or Owner that are not due to the fault of Roofing Contractor.

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 Owner.

BUILDING CODES

If plans, specifications or other design documents have been furnished to Roofing Contractor, Customer warrants that they are sufficient and conform to all applicable laws and building codes. Roofing Contractor is not responsible for loss, damage or expense due to defects in plans or specifications or building code violations unless such damage results from a deviation by Roofing Contractor from what is specified.

BUILDING CODES COMPLIANCE

Add to sentence requiring code compliance
... provided that the existing building, Contract Documents and plans and specifications are in compliance therewith.

SCHEDULE

Roofing Contractor shall have a minimum of _____ work days with conditions suitable to perform roofing work to obtain substantial completion of roof.

DELAYS

Roofing Contractor shall not be responsible for loss, damage or delay caused by circumstances beyond its reasonable control, including but not limited to acts of God, accidents, snow, fire, weather, vandalism, regulation, strikes, jurisdictional disputes, failure or delay of transportation, shortage of or inability to obtain materials, equipment or labor. In the event of these occurrences, Roofing Contractor's time for performance under this proposal shall be extended for a time sufficient to permit completion of the Work.

INSURANCE – CLAIMS NOT GROUNDS FOR WITHHOLDING PAYMENT

Moneys owed to Roofing Contractor shall not be withheld by reason of any damage or claim against Roofing Contractor covered by liability or property damage insurance maintained by Roofing Contractor or claims covered under builder's risk insurance.

WIND UPLIFT TESTING

Roofing Contractor's entitlement to payment is not dependent upon wind uplift testing. Roofing Contractor recommends full-time visual construction observation by a qualified roof monitor in lieu of uplift testing.

TOLERANCES

All labor and materials shall be furnished in accordance with normal industry standards and industry tolerances for uniformity, color, variation, thickness, size, weight, finish and texture. Specified quantities are intended to represent an average over the entire roof area.

OIL-CANNING

Metal roofing and especially lengthy flat-span sheet-metal panels often will exhibit waviness, commonly referred to as "oil-canning." The degree of oil-canning and the appearance of the panels will vary depending on factors such as the length and color of panels, alloy, gauge, galvanizing process, substrate condition, and exposure to sunlight. Oil-canning pertains to aesthetics and not the performance of the panels and is not controlled by Roofing Contractor. The type of metal roofing panels specified can affect the degree of oil-canning. Roofing Contractor is not responsible for oil-canning or aesthetics. Oil-canning shall not be grounds to withhold payment or reject panels of the type specified.

PAYMENT

If Subcontractor is not paid, Subcontractor shall be entitled to interest at the rate of 1% per month plus costs of collection, including attorney's fees. Subcontractor shall not be required to continue to work if not paid.

INTEREST & COLLECTION COSTS

All sums not paid when due shall earn interest at the rate of 1-1/2% per month. Roofing Contractor shall be entitled to recover from Customer all costs of collection incurred by Roofing Contractor, including attorney's fees, resulting from Customer's failure to make proper payment when due. Roofing Contractor's entitlement to payment is not dependent upon criteria promulgated by Factory Mutual Global, including wind uplift testing.

DISPUTE RESOLUTION - MEDIATION

If a dispute shall arise between Contractor and Customer with respect to any matters or questions arising out of or relating to this Agreement or the breach thereof, Contractor and Customer will seek to mediate the dispute.

DISPUTE RESOLUTION - ARBITRATION

If mediation is not successful, arbitration shall be administered by and conducted in accordance with the American Arbitration Association unless the parties mutually agree otherwise. This Agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in any Court having jurisdiction thereof.

DISPUTE RESOLUTION – STATUTE OF LIMITATIONS

Any legal claim against Roofing Contractor alleging any breach of this contract or negligence by Roofing Contractor must be initiated no later than two (2) years after Roofing Contractor performed the roofing installation covered by this contract.

WARRANTY EFFECTIVENESS CONDITIONED UPON RECEIPT OF PAYMENT

Warranties provided by the roofing contractor, including manufacturer warranties, shall not be effective unless and until roofing contractor has been paid in full.

**CONTRACT PROVISIONS
PARTICULARLY IMPORTANT FOR NEW
ROOF CONSTRUCTION PROJECTS**

ACCEPTANCE OF CONTRACT

If the contract proposed by the general contractor is included in the bid package, be sure that your submittal of a bid does not constitute your agreement to execute the general contractor-drafted subcontract

CONDITION YOUR PROPOSAL

“This proposal is based on execution of an American Institute of Architects’ (AIA) standard construction contract such as the AIA A401 Subcontract.”

PERFORMANCE AND PAYMENT BONDS

- Do not agree in advance to execute general contractor-drafted performance and payment bonds
- Be sure there are time limitations for a claim to be filed in the performance and payment bonds you execute
- Review the scope and duration of the performance bond obligation; does it extend through expiration of the warranty or guaranty period?
- Check the range of claimants who can make a claim on the payment bond. How far down does it extend?

ACCEPTANCE OF ADJACENT OR CONTIGUOUS WORK OR WORK OF OTHER TRADES

Subcontractor's prosecution of the roof work indicates only that the surface of the deck appears satisfactory to the Subcontractor to attach roofing materials. Subcontractor is not responsible for the construction, slope, moisture content, undulations or structural sufficiency of the roof deck or other trades' work or design.

DEBRIS AND OPENINGS IN THE ROOF DECK

General Contractor shall provide roofing subcontractor 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.

CONTRACTS - SAFETY

Properly Covering Holes

The General Contractor will hold harmless and indemnify roofing subcontractor for injuries, including fatalities, resulting from a failure by the General Contractor to see that all deck openings made by the General Contractor or other subcontractors are properly covered, secured and labeled. For openings made by other subcontractors, the General Contractor may assign to the roofing subcontractor the General Contractor's rights to obtain indemnification from the subcontractor who failed to properly cover, secure and label an opening made by that subcontractor.

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.

CONTRACT RIGHTS & REMEDIES

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

AVAILABILITY OF SITE

Roofing Contractor shall be provided with direct access to the work site for the passage of trucks and materials and direct access to the roof. Roofing Contractor shall not be required to begin work until underlying areas are ready and acceptable to receive Roofing Contractor's work and sufficient areas of roof deck are clear and available and free from water, snow or debris to allow for continuous full operation. The expense of any extra trips by Roofing Contractor to and from the job as a result of the job not being ready for the Work after Roofing Contractor has been notified to proceed will be charged as an extra.

CONTINGENT PAYMENT

Add to pay-if-paid clauses in a GC-drafted subcontract:

. . . unless Owner's nonpayment is due to Contractor.

Delete: "condition precedent"

Substitute: Contractor to make payment to Subcontractor within ____ days of Contractor's receiving payment from Owner.

CONTINGENT PAYMENT

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

BACKCHARGES

No backcharge or claim for services rendered or equipment furnished by Contractor to Subcontractor shall be sought to be imposed by Contractor unless previously authorized in writing or unless written notice is given to Subcontractor within five (5) days of the event, act or omission that is the basis of the backcharge.

COORDINATION OF WORK / DAMAGES TO WORK

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 Subcontractor's work is damaged by other trades, Contractor agrees to backcharge the trades causing the damage. Contractor will purchase or arrange with Owner to maintain builder's risk insurance.

POTENTIAL CONTRACT PROVISION INTENDED TO PROTECT ROOFING CONTRACTORS AGAINST EXTRA INSTALLATION COSTS DUE TO THE FAULT OF OTHERS

Roofing contractor's bid or proposal is based on the roofing contractor being able to perform the roof installation in an efficient manner. Roofing contractor's price is based on the job being ready for continuous roof installation when roofing contractor is asked to commence roofing work and roofing installation being able to proceed in a logical, sequential manner without interference, interruption or obstruction so that roofing materials can be installed efficiently without disruption, interference or damage by other trades.

POTENTIAL CONTRACT PROVISION INTENDED TO PROTECT ROOFING CONTRACTORS AGAINST EXTRA INSTALLATION COSTS DUE TO THE FAULT OF OTHERS

- If roofing contractor is required to perform its Work out of sequence, to undertake multiple mobilizations and demobilizations, or to work around obstructions or equipment that were not shown on the original plans, roofing contractor shall be entitled to additional compensation and time commensurate with the additional costs and time expended by roofing contractor.
- If the roof is damaged by other trades, General Contractor will backcharge the trades causing the damage and compensate roofing contractor for repairs or material replacement as needed.

**CONTRACT PROVISIONS
PARTICULARLY IMPORTANT FOR RE-
ROOFING CONSTRUCTION PROJECTS**

DISCLAIMER PROVISION TO PROTECT RE-ROOFING CONTRACTOR FROM LIABILITY FOR INADEQUATE DRAINAGE DESIGN

Drainage. Roofing Contractor shall not be liable for any claims or damages arising from or related to deficiencies in drainage. It is the Customer's responsibility to retain a licensed architect or mechanical engineer to determine and evaluate the drainage design and compliance with existing plumbing codes, including potential need for additional drains, scuppers, or overflow drains, prior to commencement of re-roofing. Roofing Contractor's work does not include evaluation of code compliance, existing drainage, proper location or size of roof drains, or adequacy of drainage. Roof Contractor is not responsible for ponding.

NATURE OF WORK

Roofing Contractor shall furnish the labor and material necessary to perform the work described herein or in the referenced contract documents. Roofing Contractor does not provide design, engineering, consulting or architectural services. It is the Owner's responsibility to retain a licensed architect or engineer to determine proper design, drainage and code compliance, including a determination as to whether and what type of a vapor or air retarder is needed.

CONTRACTS - SAFETY

STRUCTURAL SUFFICIENCY OF DECK

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

CONTRACTS - SAFETY

STRUCTURAL SUFFICIENCY OF DECK

Owner and Property Manager represent that they are not presently aware of any hazard or condition in, at or on the building which would endanger the life and safety of Contractor's personnel, that the structure and roof deck of the building is sufficient to support Contractor's personnel and equipment on the roof performing roof removal and replacement operations and they are not presently aware of any areas of deteriorated, rusted or unattached roof decking that present a safety hazard to Contractor's personnel or individuals and property within the building. If Owner or Property Manager deems it necessary, Owner or Property Manager will retain a structural engineer to evaluate the safety of the structure prior to commencement of re-roofing operations.

ASBESTOS

Contractor's price and this contract are based upon 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.

FUMES

Customer is aware that roofing products emit fumes, vapors and odors during the application process. Customer shall be responsible for interior air quality, including controlling mechanical equipment, HVAC units, intake vents, wall vents, windows, doors and other openings to prevent fumes and odors from entering the building. Some people are more sensitive to these emissions than others. Customer shall hold Roofing Contractor harmless from claims from third parties relating to fumes and odors that are emitted during the normal roofing process.

EXISTING CONDITIONS

Roofing Contractor is not responsible for damages or leaks due to existing conditions or existing sources of leakage simply because Contractor started work on a building or performed repair work.

DECK REPAIRS

Repairs or replacement of pieces or areas of decking will be made as needed to provide an adequate substrate for roofing. This work will be performed on a unit price basis.

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.

INTERIOR PROTECTION - TENANTS

Customer shall notify occupants and 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.

FIREPROOFING

Roofing contractor is not liable for fireproofing that may detach, fall or spall from the underside of the roof deck or structural members during roofing operations, including costs of clean-up and replacement of fireproofing.

POTENTIAL CONTRACT PROVISION TO BE INSERTED IN CONTACTS WHEN ROOFING CONTRACTOR IS REQUIRED TO ENROLL IN A CONSOLIDATED INSURANCE PROGRAM (“WRAP-UP”)

[Owner/General Contractor] has indicated that this Project is to be covered by [an Owner-controlled insurance program (“OCIP”) / a Contractor-controlled insurance program “CCIP”]. Roofing contractor has been requested to enroll in the [OCIP/CCIP] and deduct the cost of insurance for the Project from its proposal. Roofing Contractor is unwilling to agree to enroll in the [OCIP/CCIP] and reduce its proposal to reflect insurance cost savings unless the [OCIP/CCIP] coverage is at least equal to the corresponding insurance presently maintained by Contractor. Roofing Contractor shall have the right to review the [OCIP/CCIP] policy, including having the right to have Roofing Contractor’s insurance agent or broker evaluate the [OCIP/CCIP] policy compared to the corresponding Contractor’s policy. Roofing Contractor shall have the right to determine if the [OCIP/CCIP] policy provides Roofing Contractor with equivalent insurance coverage.

POTENTIAL CONTRACT PROVISION TO BE INSERTED IN CONTACTS WHEN ROOFING CONTRACTOR IS REQUIRED TO ENROLL IN A CONSOLIDATED INSURANCE PROGRAM (“WRAP-UP”)

- ▶ If the [OCIP/CCIP] policy provides equivalent and adequate coverage in Roofing Contractor’s reasonable opinion, Roofing Contractor will agree to enroll in the [OCIP/CCIP] and reduce the price of its proposal appropriately. If the [OCIP/CCIP] policy does not provide equivalent coverage in Roofing Contractor’s reasonable opinion, Roofing Contractor has the right either to provide its own insurance and not enroll in the [OCIP/CCIP] or will provide its own insurance to supplement the [OCIP/CCIP] policy and the Roofing Contractor’s price will be reduced to the extent of any savings realized by Roofing Contractor.

POTENTIAL CONTRACT PROVISION TO BE INSERTED IN CONTACTS WHEN ROOFING CONTRACTOR IS REQUIRED TO ENROLL IN A CONSOLIDATED INSURANCE PROGRAM (“WRAP-UP”)

- ▶ If this Project was bid based on the Roofing Contractor enrolling in the [OCIP/CCIP] and the Roofing Contractor did not include the costs of insurance in its proposal and the [OCIP/CCIP] does not provide equivalent coverage in Roofing Contractor’s reasonable opinion, Roofing Contractor has the right to have its own insurance coverage or supplemental insurance as reasonably necessary for this Project and add those costs to its price for the Project.

IMPLIED CONTRACT TERM

COVENANT OF GOOD FAITH AND FAIR DEALING

- Implied in all contracts
- If the other party has acted unreasonably but not necessarily in breach of the contract and the unreasonable conduct causes you not to have the benefit of the bargain, you may have a valid claim for breach of the implied covenant of good faith and fair dealing

TAKE AWAY . . .

- ▶ Use contract provisions as a tool to manage and limit your liability
- ▶ Be vigilant in not agreeing to contract provisions that unreasonably expand your liability

COLORADO STATUTES & CASE DECISIONS

COLORADO STATUTES OF LIMITATION & REPOSE

C.R.S.A. § 13-80-102 General Limitation of Action

Two (2) years after the cause of action accrues;
includes tort actions for **negligence**, strict liability,
wrongful death

COLORADO STATUTES OF REPOSE

C.R.S.A. § 13-80-104 Limitation of actions against architects, constructors, builders or builder vendors, engineers, inspectors and others

- Action must be brought within time provided in § 13-80-102 after the claim for relief arises
- But in no case more than **6 years after substantial completion** of the improvement to real property, unless
- The cause of action arises during the 5th or 6th year after substantial completion; then an additional 2 years after the date upon which the cause of action arises

COLORADO STATUTES OF LIMITATION & REPOSE DISCOVERY RULE

C.R.S.A. § 13-80-104(1)(b) | Claims for relief arises at the time the Claimant or the Claimant's predecessor in interest discovers or in the exercise of reasonable diligence should have discovered the physical manifestation of a defect in the improvement which ultimately causes the injury.

COLORADO STATUTES OF LIMITATION & REPOSE

CLAIMS FOR INDEMNIFICATION & CONTRIBUTION

C.R.S.A. § 13-80-104(1)(b)II – 90 days after the claim for indemnification or contribution arises; claim for indemnification or contribution arises at the time the third person's claim against the claimant is settled or at the time of the final judgment; whichever comes first

Extends 6-year statute of repose. *In re Richard Goodman v. Heritage Builders, Inc.*, 390 P.3d 398, Superior Court of Colorado, February 27, 2017

COLORADO CONSTRUCTION DEFECT ACTION REFORM ACT C.R.S.A. § 13-20-802, ET SEQ.

- Claimant must send a written notice of claim to construction professional at least 75 days before filing an action and at least 90 days in the case of a commercial property.
- Upon construction professional's written request, claimant shall provide reasonable access to the claimant's property during normal working hours to inspect the property and claim defect. Inspection shall be completed within 30 days of notice of claim.

COLORADO CONSTRUCTION DEFECT ACTION REFORM ACT C.R.S.A. § 13-20-802, ET SEQ.

- Within 30 days or 45 days for a commercial property, construction professional may send an offer to settle the claim by making payment or agreeing to remedy the claimant defect.
- Claimant has 15 days to accept construction professional's offer
- If no action is made or claimant rejects the offer, claimant can commence the action.

COLORADO CONSTRUCTION DEFECT ACTION REFORM ACT TOLLING - C.R.S.A. § 13-20-805

If nature of claim is sent per 13-20-803, within the statutes of limitation and repose, then the statute of limitation or repose is tolled until 60 days after completion of the notice of claim process.

COLORADO CASE DECISIONS

In re Goodman v. Heritage Builders, 390 P. 3d 398, Colorado Supreme Court, 2017 – General Contractor has 90 days after settlement or judgment to bring claim for indemnification or contribution against subcontractor.

COLORADO CASE DECISIONS

American Family Mutual Insurance Company v. Tamko Building Products, Inc., 2016 WL 1460322, U.S. District Court for Colorado, 2016 – Tamko could enforce arbitration provision on shingle wrapper opened by contractor as general contractor and roofing subcontractor were considered agents of the insured homeowners.

COLORADO CASE DECISIONS

Pinnacol Assurance v. Huff, 2016 WL 3574393, Supreme Court of Colorado, 2016 - Based on Colorado's Workers' Compensation Act, residential building owner and prime contractor were liable for injury to employee of subcontractor who suffered job-site injury after subcontractor's workers' compensation policy had lapsed due to subcontractor's nonpayment of premium. Certificate of insurance issued to prime contractor did not require the subcontractor's insurer to give notice of policy cancellation to the prime contractor or owner; neither did Colorado's Worker's Compensation Act so there was no legal duty for subcontractor's workers' compensation insurer to notify prime contractor or owner of policy cancellation due to non-payment of premium.

COLORADO CASE DECISIONS

Disher v. Tamko Building Products, Inc., 2015 WL 4609980, U.S. District Court, S.D. Illinois, 2015 – Denver homeowner submitted claim to Tamko for alleged defective Tamko Heritage 30 shingles installed in 2015. Plaintiff purchased home in 2011. Tamko said plaintiff was ineligible for warranty coverage because he was secondary owner. Court found Tamko's restriction on transferability to violate Colorado's UCC 2-318, which prohibits a seller from excluding or limiting a warranty from a person who may reasonably be expected to use or be affected by the goods and is injured by the breach of warranty.

MANUFACTURER DRAFTED-APPLICATOR AGREEMENTS

PROBLEMATIC PROVISIONS

PURCHASE OF BUILDING ENVELOPE SYSTEMS

Notwithstanding any contrary terms in any purchase order, which shall not be binding on Manufacturer, Manufacturer shall sell materials to Applicator subject to Manufacturer's standard terms, conditions, prices and shipping practices In effect on the date of shipment.

Manufacturer reserves the right to change its price lists at any time, but in this event of an increase in the price applicable to orders already placed by Applicator, Manufacturer may delay application of new prices for specified projects when such delay has been requested and granted, In writing, or the Applicator may cancel any such orders without charge or penalty by written notice within ten (10) days after the date of the announcement of such price increase.

LIMITED WARRANTY TO APPLICATOR

Manufacturer warrants its material to be free from manufacturing defects. Manufacturer's liability and Applicator's remedies are limited to Manufacturer's replacement of defective material, F.O.B. factory.

LIMITED WARRANTY TO APPLICATOR

THERE ARE NO WARRANTIES THAT EXTEND BEYOND THE FACE HEREOF. Manufacturer MAKES NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND Manufacturer HEREBY DISCLAIMS ALL SUCH WARRANTIES, Manufacturer SHALL IN NO EVENT BE LIABLE FOR ANY INCIDENTAL OR CONSEQUENTIAL DAMAGES.

INSURANCE AND INDEMNITY

Applicator agrees to indemnify, defend and save Manufacturer harmless from any and all damages, losses or expanses including reasonable attorney's fees, direct or indirect, including settlement of any claim (subject to Applicator's approval, which shall not be unreasonably withheld) to which Manufacturer may be subjected to because of Applicator's negligence or failure to perform any term or condition of this Agreement. Manufacturer shall not be obligated to appeal any judgment that would impose liability on Applicator.

INSURANCE AND INDEMNITY

Manufacturer shall indemnify and save Applicator harmless from all damages, losses or expenses, including reasonable attorney's fees, which Applicator may sustain as determined by a final judgment against Applicator or a settlement of any claim, approved in writing by Manufacturer, resulting from Manufacturer's negligence in performing or failure to perform its obligations under the limited warranty; provided, however, that this Indemnity shall not be enforceable against Manufacturer (whether or not Manufacturer may have been negligent in performing or failing to perform its obligations under the limited warranty) if the damages, losses or expenses sustained by Applicator were caused in whole or in part from any act or failure to act by Applicator as required by this Agreement.

LIMITATION OF LIABILITY

TO THE EXTENT NOT LIMITED AS SET FORTH IN PARAGRAPH 11(c), APPLICATOR'S EXCLUSIVE REMEDY SHALL BE FOR DAMAGES, AND MANUFACTURER'S TOTAL LIABILITY FOR ANY AND ALL LOSSES ARISING OUT OF ANY CAUSE WHATSOEVER (WHETHER SUCH CAUSE BE BASED IN CONTRACT, NEGLIGENCE, STRICT LIABILITY, OTHER TORT OR OTHERWISE) SHALL IN NO EVENT EXCEED APPLICATOR'S NET LOST PROFITS FROM INSTALLATION OF MANUFACTURER BUILDING ENVELOPE SYSTEMS BY APPLICATOR DURING THE THREE (3) MONTH PERIOD PRIOR TO THE EVENT THAT GAVE RISE TO THE LOSSES. NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY, MANUFACTURER SHALL NOT BE LIABLE TO THE APPLICATOR FOR INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, OR PUNITIVE DAMAGES OF ANY KIND, INCLUDING, WITHOUT LIMITATION, LOST PROFITS OR LOST OPPORTUNITIES.

GENERAL PROVISIONS

This Agreement shall be governed and construed in accordance with the laws of the state of Tennessee, without regard to conflicts of law principles. Subject to the parties' obligation to conclusively resolve all disputes through mediation as set forth in Paragraph 12, any suit arising out of this Agreement or the rights and/or obligations hereunder shall be heard exclusively in the state and federal courts located in Davidson County, Tennessee. Each party irrevocably consents to the jurisdiction and venue of the above-identified courts

GENERAL PROVISIONS

Each party acknowledges and agrees that this Agreement has been jointly prepared by the parties and will not be strictly construed against either party.