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# Fending off Low Slope Litigation

Leanne Prybylski & Stephen Phillips  
Hendrick Phillips Salzman & Siegel



**C. Leanne  
Prybylski**



**Stephen M. Phillips**







HENDRICK PHILLIPS  
SALZMAN & SIEGEL<sup>PC</sup>  
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# Recommended Steps for Roofing Contractors and Others to Protect Themselves and Avoid Claims and Litigation In Low Slope Roofing

*Prepared by:*

Stephen M. Phillips

C. Leanne Prybylski

HENDRICK, PHILLIPS, SALZMAN & SIEGEL

230 Peachtree Street, N.W.

Suite 2500

Atlanta, Georgia 30303

[smp@hpsslaw.com](mailto:smp@hpsslaw.com)

[clp@hpsslaw.com](mailto:clp@hpsslaw.com)

(404) 522-1410



HENDRICK PHILLIPS  
SALZMAN & SIEGEL<sup>PC</sup>  
ATTORNEYS AT LAW

# Technical Competence, Roofing Expertise and Experience in the Field – Competent Superintendents, Foremen, Designers and Crew

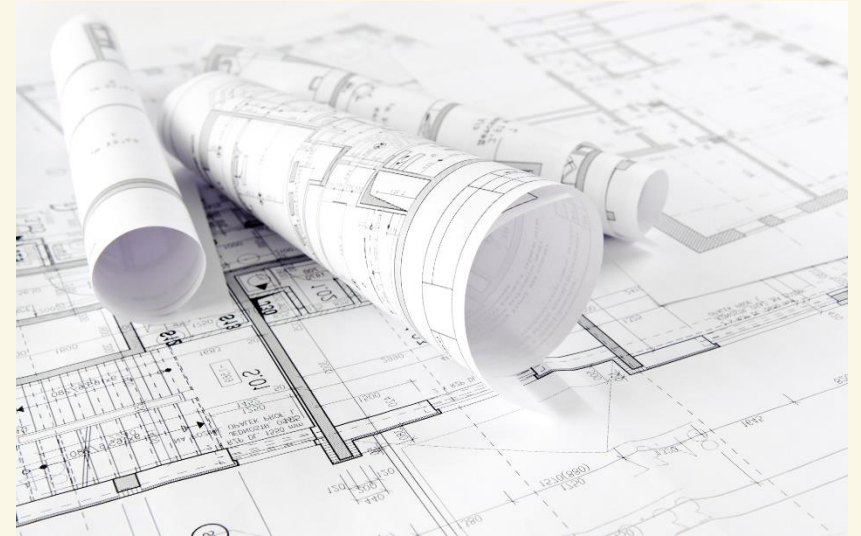
- ✓ Stay current, technically
- ✓ Retain and reward good people





# Technical Pre-Job Competence in the Office – Being Able to Recognize Problem Specifications, Details and Design

- Knowledge of and familiarity with code requirements
- Knowledge of and familiarity with wind-uplift criteria, calculations, and steps to obtain compliance



# Realistic Budgets

- There are no miracle products.
- Coating vs. Recover or Re-roofing
- Recover vs. Re-roofing





# 100% Commitment to Job-Site Safety – Particularly Positive Fall Protection

- Effective and continuous training
- On-going and continuous inspections and effective, meaningful enforcement
- Guard rails or tie-off in lieu of safety monitors outside warning lines
- Use of safety officer; potential use of outside safety consultant

**SAFETY FIRST**



**Safety  
Starts  
Here**

**Think Safe...  
Work Safe...  
Be Safe**

# Contract Competence

## Attention to Contracts – Pre-Execution



Avoid signing contracts with provisions that unreasonably expand liability

- ✓ Add provisions to deal with situations, problems and issues that arise in low-slope roofing projects (e.g., deck acceptance, ponding, oil-canning, fumes)
- ✓ Become comfortable evaluating and negotiating construction contracts

# Contract Competence – Pre-Execution

## Six Major Issues

- Broad Indemnification Obligation
- Price Escalation and Delays in Delivery of Materials
- Risk of Loss and Damage Caused by Other Trades or Causes Beyond Your Control
- Acceptance and Condition of Substrate / Deck
- Code Compliance and Design
- Schedule Compliance and Liability for Delays



# Contract Competence – Pre-Execution

## Avoid Broad Indemnification Provisions

- Limit indemnity obligation to the extent damages are caused by your negligence or the negligence of those for whom you are responsible
  - You should not have to indemnify the Owner, General Contractor, or others for their own negligence
- Attempt to limit indemnity to claims for bodily injury and/or property damage (other than the Work itself) so that a claim would be covered under your CGL insurance. Your work is covered under warranty and breach of contract.

# Contract Competence – Pre-Execution

## Avoid Broad Indemnification Provisions

### Sample Provision Limiting Indemnity Obligation:

Contractor shall indemnify and hold harmless the Owner and Owner's agents and employees 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, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or damage to tangible property (other than the Work itself), *but only to the extent caused by the negligent acts or omissions of the Contractor or someone for whose acts the Contractor is liable.*

Alternative: Adopt AIA language

# Contract Competence – Pre-Execution

## Protect Yourself from Price Escalation and Delays in Delivery of Materials

- Do not sign a fixed price contract unless:
  - You already have all the needed materials;
  - You have guaranteed fixed pricing, in writing, from your supplier (need assurance that pricing will **not** change); or
  - The contract has an escalation clause that entitles you to a price increase if costs of materials increase.
- Make sure the contract has a provision that entitles you to an extension of time for delays in delivery of materials.



# Contract Competence – Pre-Execution

## Protect Yourself from Price Escalation and Delays in Delivery of Materials



- Beware of the following provisions:
  - No escalation clauses
  - No damages for delay
  - No extensions of time for delays in delivery
  - Extensions of time for “unusual” delays in delivery may no longer protect you because delays are becoming commonplace

# Contract Competence – Pre-Execution

## Protect Yourself from Price Escalation and Delays in Delivery of Materials

### Sample Provision to Protect You from Price Escalation:

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, insulation, and membrane products. 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.

If there is an increase in price of materials or products between the date of this Agreement and the time when the affected material is delivered to the Project, the Contract Sum shall be increased to reflect the additional cost to obtain the materials, provided the Roofing Contractor provides written notice and documentation of the increased costs.

# Contract Competence – Pre-Execution

## Protect Yourself from Price Escalation and Delays in Delivery of Materials

### Sample Provision to Protect You from Price Escalation and Delays in Delivery:

The construction industry is currently experiencing shortages and delays in obtaining construction 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 used and installed in the construction of the Project may become unavailable, delayed in shipment, and/or subject to price increases due to circumstances beyond the control of the Contractor. If a specified product is unavailable or delivery is delayed, Contractor shall provide written notice to Owner 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 the time when the affected material is delivered to the Project, the Contract Sum shall be increased to reflect the additional cost to obtain the materials, provided that the Contractor provides written notice and documentation of the increased costs.



# Contract Competence – Pre-Execution

## Do Not Accept Risk for Loss You Did Not Cause

- Do not accept responsibility for damage caused by other trades or causes beyond your control (*e.g.*, tornadoes)
- Owner or General Contractor should carry Builder's Risk insurance policy



- Beware of the following provisions:
  - Assumption of the risk of loss until final completion
  - Requirement to protect your work and correct any damage at your cost, regardless of cause

# Contract Competence – Pre-Execution

## Do Not Accept Risk for Loss You Did Not Cause

### Sample Provisions Regarding Damage to Your Work:

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.

Roofing Contractor is not responsible for losses not due to the fault of Roofing Contractor.

# Contract Competence – Pre-Execution

## Do Not Accept Responsibility for the Deck/Substrate

- Accept Responsibility Only for Observing **Visible** Conditions and Reporting **Discovered** Deficiencies on the **Surface**
  - You should not be responsible for deficiencies in the work of others.



- Beware of the following provisions:
  - Requirements to Inspect and Accept Adjacent Work
  - By Commencing the Work You Accept the Substrate



# Contract Competence – Pre-Execution

## Do Not Accept Responsibility for the Deck/Substrate

### Sample Provision Disclaiming Liability for Issues with the Deck:

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

# Contract Competence – Pre-Execution

## Do Not Accept Responsibility for Existing Conditions of a Building

- Accept Responsibility Only for Observing **Visible** Conditions and Reporting **Discovered** Deficiencies
  - Particularly Important for Re-Roofing Projects
    - May Encounter Asbestos or Other Toxic Materials
    - Do Not Want Responsibility for Leaks Due to Causes Other than Your Re-Roofing Work (*e.g.*, leaks from other building components or in areas that have not yet been re-roofed)



- Beware of provisions requiring inspection and acceptance of conditions

# Contract Competence – Pre-Execution

## Do Not Accept Responsibility for Existing Conditions of a Building

### Sample Provision Disclaiming Liability for Existing Conditions:

Roofing Contractor's price and this contract are based upon Roofing Contractor 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.



# Have a Comprehensive Insurance Program and Coverages – Work with an Experienced and Construction-Savvy Insurance Adviser or Broker

- Commercial general liability (CGL) without non-standard exclusions and endorsements (*e.g.*, open roof exclusions)
- Pollution coverage – to cover potential fume claims
- Faulty workmanship coverage; errors and omissions coverage
- Blanket builder's risk/installation floater coverage

# Establish Open Good Lines of Communication and Working Relationships with all Other Parties

- Early and continuous communication
- Work toward and earn relationships of trust
- Show shared commitment to the Project



# Establish, Nurture, and Maintain Key Relationships with Manufacturers, Suppliers, Vendors, and Others

- Not always best to make price the only criterion





# Decks – Properties and Slopes



# Understand Wind Uplift, Resistance and Wind Speed Coverage and Follow Installation Procedures and Checks to Obtain Compliance





# Work with Competent Subcontractors Who Comply with Legal Requirements

- Competence
- Work only with subcontractors who classify and treat the personnel they bring to the job as their employees (not independent contractors) and make the legally required deductions
- Ensure job site safety



**Install Systems and  
Materials That Have  
a Solid Track  
Record and You Are  
Comfortable and  
Competent to Install**





# Pay Attention and Manage Warranty and Guaranty and Performance Bond Requirements



# Contract Compliance – During Construction

- Comply with notice and claim submission requirements





# Preserve Lien Rights



- Know the lien procedure and deadlines in the state where you are working
- Know the date you last performed work other than “go-back” work and make sure you file your lien timely and correctly

# Preserve Payment Bond Claims



- Know who is a claimant under the bond and, if required, the procedure for providing notice of the claim
- Know the deadline for filing an action on the bond and be aware that a statutory deadline may apply
- Know the date you last performed work other than “go-back” work and make sure you file your claim timely and correctly

# Have Your Own Contract Forms, Especially for Re-Roofing, with Terms Geared for Roofing

- Proposal/Contract
- Warranty
- Subcontract
- Purchase Order
- Maintenance Contract
- Work Order Authorization
- Invoice







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**PREPARED BY:**

**Stephen M. Phillips, Esq.**

**C. Leanne Prybylski, Esq.**

[smp@hpsslaw.com](mailto:smp@hpsslaw.com)

[clp@hpsslaw.com](mailto:clp@hpsslaw.com)

**HENDRICK, PHILLIPS, SALZMAN & SIEGEL**

**230 Peachtree Street, N.W.**

**Suite 2500**

**Atlanta, Georgia 30303**

**Telephone: (404) 522-1410**



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