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LEGAL ADVOCATES, ADVISORS & CONSULTANTS TO THE CONSTRUCTION INDUSTRY



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1981 - 2021

40

YEARS OF SERVICE



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Contracts: Negotiating from a Position of Strength



Presented by

Benjamin S. Lowenthal, Esq.

HENDRICK, PHILLIPS, SALZMAN & SIEGEL

230 Peachtree Street, N.W.

Suite 2500

Atlanta, Georgia 30303

bsl@hpsslaw.com

(404) 522-1410 ext. 121

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Introduction

- ◆ All construction projects and their contractual relationships present “minefields” of risk to insulator contractors.
- ◆ Recurrent patterns of conduct which tend to lead to these risks “blowing up” into major disputes.



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Introduction

◆ Recurrent Problem Patterns

- Failure to Know and Assess Who You Are Contracting with (know the General Contractor and Owner)
- Failure to Understand and Avoid “Killer” Contract Clauses
- Failure to Comply with Contractual Claim “Notice” Requirements



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First Rule of Contracting

- ◆ Know and Assess Who You Are Contracting with (know the Contractor and Owner)!
- ◆ The “contractor factor” – due diligence in investigation
 - Technical Experience & Competence
 - Trustworthiness
 - Reputation
 - Track Record With Similar Projects
 - “Empty Shell” – the project specific “LLC” dilemma



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Due Diligence

◆ Who are you contracting with?

- Make sure to fully assess prospective contracting partners (all the way up the contract chain)
- Rights and recourse – even if you perform fully and flawlessly – you are often no better than the “weakest link” in the contract chain



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Contracts

- ◆ Large print giveth and small print taketh away
- ◆ Courts enforce good and bad contracts
- ◆ You have a duty to read and ignorance is no excuse!



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Creating Leverage

- ◆ Your price
- ◆ “This Proposal and the Contract Price expires 30 days after the date stated above.”
- ◆ Conditioning your bid or proposal on use of the AIA A401 contract document (Standard Form of Agreement Between Contractor and Subcontractor)
 - “This bid is conditioned on the use of the AIA A401 contract document or otherwise mutually agreeable contract.”



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Contract Deal Breakers

- ◆ Personal guarantees
- ◆ Prospective waiver of lien rights
- ◆ Broad form indemnity provisions
(covers other party's negligence)
 - "Subcontractor agrees, to the fullest extent permitted by law, to indemnify and hold Contractor harmless against liability for all claims, whether or not such claims arise from, result from or are caused by the Contractor's negligence."



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“Killer” Contract Clauses

- ◆ Material Price Escalation Clauses
- ◆ Indemnification Clauses and Additional Insured
- ◆ Mutual Rights and Remedies
- ◆ Contingent Payment Clauses (Pay-if-Paid)
- ◆ Change Order Work
- ◆ Waivers and Releases
- ◆ Scheduling and Delay Issues
- ◆ Backcharges
- ◆ Building Code and Design
- ◆ Contractual Notice Requirements



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Material Price Escalation Clauses

◆ Limit price in proposals:

- Due to high volatility in material prices, the price(s) stated in this proposal is/are valid only for contracts accepted and executed within _____ days of the date of this proposal.



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Material Price Escalation Clauses

◆ Suggested Insert:

- 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 Subcontractor. If a specified product is unavailable or shipment is delayed, Subcontractor shall provide written notice to 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 the time when the Project is ready for installation of the affected material, the Contract Sum shall be increased to reflect the additional cost to obtain the materials,** provided that Subcontractor provides written notice and documentation of the increased costs.



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Indemnification

- ◆ Arguably the most important provision.
- ◆ We want to avoid accepting liability for the negligence of others.
- ◆ Seek to limit liability to insurance covered damages.



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AIA® Document A401™ – 2017 Standard Form of Agreement Between Contractor and Subcontractor

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, 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 attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, 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.



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Indemnification – Inserts

Insert: Subcontractor shall not be obligated to indemnify a party from their own negligence.

Insert: Subcontractor is not obligated to provide indemnification for damages, losses or claims to the extent due to the negligence of indemnitees or others for whose conduct Subcontractor is not responsible.

Insert: Similarly, Contractor shall indemnify and hold harmless Subcontractor from all damages, losses, or expenses, including attorney's fees, arising from any claims or damages for bodily injury, sickness, disease, or death, or from claims for damage to the extent due to the negligence of Contractor or the fault of any of its agents, representatives or employees.



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Additional Insured

- ◆ Right behind the indemnity provision in terms of importance.
- ◆ Problematic because additional insured provisions can unfairly shift the financial responsibility for claims to the subcontractor or its insurance company.



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Additional Insured – Insert

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



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Related – Waivers of Subrogation

◆ What is it?

- A contract clause that prevents an insurer from suing the third party (contractor) that caused the insured's (subcontractor) loss.

◆ Example: "Coverage shall contain a waiver of subrogation in favor of Contractor and the Owner."

◆ Delete it or seek a reciprocal waiver of subrogation.



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AIA A401: § 12.5

Waiver of Subrogation

- ◆ The Contractor and Subcontractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents, and employees, each of the other, and (2) the Owner, the Architect, the Architect's consultants, and (3) Separate Contractors, if any, and any of their subcontractors, sub-subcontractors, agents, and employees for damages caused by fire or other causes of loss to the extent those losses are covered by property insurance provided under the Prime Contract or other property insurance applicable to the Work or to property at or adjacent to the Project site, except such rights as they may have to proceeds of such insurance held by the Owner as a fiduciary. The Subcontractor shall require similar written waivers in favor of the individuals and entities enumerated herein from the Subcontractor's Sub-subcontractors, agents, and employees. The policies of insurance purchased and maintained by each person or entity agreeing to waive claims pursuant to this Section 12.5 shall not prohibit this waiver of subrogation, which shall be effective as to a person or entity (1) even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, (2) even though that person or entity did not pay the insurance premium directly or indirectly, or (3) whether or not the person or entity had an insurable interest in the property damaged.



Mutual Rights and Remedies

- ◆ Most subcontracts bind the subcontractor to all the obligations, risks, and responsibilities that the contractor took on with its contract with the owner.
- ◆ We want to make sure that they have all the benefits of all the right and remedies that the contractor was able to negotiate with the owner.



Mutual Rights and Remedies - Insert

- ◆ “The Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities which the Contractor, under such documents, assumes toward the Owner, **and Subcontractor shall have the benefit of all rights and remedies toward the Contractor as the Contractor has toward the Owner.**”



Pay-if-Paid Clauses

- ◆ Contingent payment clause – contractual provision making payment contingent upon the happening of some event.
- ◆ Construction contracts – conditions payment to the subcontractor on the general contractor's receipt of payment from the owner.



Pay-if-Paid Clauses

◆ Two forms:

■ “Pay-if-paid”

- ◆ Owner must pay the contractor in order for the subcontractor to ever receive payment.
- ◆ Allows a contractor to permanently withhold payment from its subcontractor where the owner has failed to pay the contractor.

■ “Pay-when-paid”

- ◆ Links the timing of payment to the subcontractor to the time when payment is made by the owner to the contractor.
- ◆ Courts generally interpret “pay-when-paid” clauses to require a contractor to pay its subcontractor within a “reasonable time” of the completion of satisfactory work.



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Pay-if-Paid Clauses

- ◆ In most states, “pay-if-paid” clauses are ***enforceable*** if explicit and unambiguous.



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Pay-if-Paid Clauses

◆ However, “pay-if-paid” clauses are generally ***unenforceable*** in the following states:

- California, Delaware, Maine, Massachusetts, Nevada, New York, North Carolina, South Carolina, Vermont, and Wisconsin.



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Pay-if-Paid Clause Responses

- ◆ Respond with “pay-when-paid” clause:
 - “The contractor shall make payment to the subcontractor within seven (7) days of receipt of payment from the owner for the subcontractor’s work.”
- ◆ Try to take out “condition precedent” in every contract!
- ◆ Owner insolvency issues – be on the look out of taking on the risk of Owner’s insolvency.



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Pay-if-Paid Examples

Payment by the Owner to Contractor shall be a condition precedent to Contractor's obligation to make any interim progress payment to Subcontractor.

Receipt of payment by the Contractor from the Owner for the Subcontract Work is an express condition precedent to payment by the Contractor to the Subcontractor. The Subcontractor hereby acknowledges that it accepts the risk of nonpayment by the Owner.



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Responses and Inserts

Payment by the Owner to Contractor shall be a condition precedent to Contractor's obligation to make any interim progress payment to Subcontractor, **unless Owner's nonpayment is due to Contractor.**

Receipt of payment by the Contractor from the Owner for the Subcontract Work is an express condition precedent to payment by the Contractor to the Subcontractor, unless Owner's nonpayment is due to Contractor. The Subcontractor hereby acknowledges that it accepts the risk of nonpayment by the Owner. **Subcontractor does not accept the risk of Owner nonpayment to Contractor due to the Contractor.**

Insert: 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.



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Change Orders

- ◆ Watch out for terms that allow for the waiver of change order work if no written change order is given.
- ◆ Avoid language that does not include reasonable contemporaneous compensation for changes.
- ◆ Avoid clauses that do not clearly permit and specify the method for preserving claims.



Change Order - Insert

Insert: If Subcontractor is requested by Contractor to perform extra or changed work that was not part of Subcontractor's original scope of work, Contractor will provide reasonable compensation to Subcontractor for said work. Contractor shall not give orders to Subcontractor for work that is required to be performed at that time and then refuse to make payment on the grounds that a Change Order was not executed at the time the work was performed or the Contractor's representative was not authorized to order the change. Contractor and Subcontractor recognize that in order for construction projects to proceed in a timely and efficient manner, changes in the original specifications frequently are made prior to execution of formal change order documents. The parties agree to work in good faith with each other so that Subcontractor does not proceed with changed work without authorization and Subcontractor receives fair compensation for authorized, change work.



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Waivers and Releases

- ◆ Watch for prospective lien waivers.
- ◆ Revise contract language that seeks to require a release of **all** claims in exchange for final payment.
- ◆ Condition releases and waivers on receipt of payment.



Waivers and Releases – Examples

Subcontractor does hereby release and forever discharge Contractor of and from any and all manner of claims, demands and causes of action whatsoever against them which Subcontractor may have for, upon or by reason of any matter, cause or thing whatsoever arising under or out of the contract.



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Waivers and Releases – Response

Subcontractor “does hereby ... further remise, release and forever discharge Contractor ... of and from any and all manner of claims, demands and causes of action whatsoever against [them] which contractor ... may have for, upon or by reason of any matter, cause or thing whatsoever arising under or out of the contract, as of release date, but excepting those claims previously identified in writing which remain unresolved.



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Waivers and Releases – Examples

The undersigned Subcontractor for and in consideration of the Sixty-nine thousand thirteen dollars and 11/100, \$69,013.11 and other good and valuable consideration, the receipt for which is hereby acknowledged, does hereby waive, release and relinquish any and all claims, demands and rights of lien for work, labor and/or materials furnished through the 7th day of October, 2020 on the above described project.

The undersigned further deposes and says that all labor, materials, supplies, equipment, etc., furnished by the undersigned, have been fully paid for and discharged through the above date.



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Waivers and Releases – Response

The undersigned Subcontractor **upon receipt of** Sixty-nine thousand thirteen dollars and 11/100, \$69,013.11 and other good and valuable consideration, the receipt for which is hereby acknowledged, does hereby waive, release and relinquish any and all claims, demands and rights of lien for work, labor and/or materials furnished through the 7th day of October, 2020 on the above described project, **but excepting claims for retainage and those claims previously identified in writing which remain unresolved.**

The undersigned further deposes and says that all labor, materials, supplies, equipment, etc., furnished by the undersigned, have been fully paid for and discharged **through the last progress payment received from Contractor.**



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Scheduling

- ◆ Identify the days needed with conditions suitable for your work to achieve substantial completion.
- ◆ Have input on scheduling.



Scheduling – Inserts

Insert: Subcontractor shall be entitled to a minimum of ____ work days with conditions suitable for its work within which to achieve substantial completion.

Insert: Each Work Order shall contain a mutually-agreed upon minimum number of workdays with conditions suitable for performing insulation work for Subcontractor to achieve substantial completion.



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Delay Damages and Liquidated Damages

Insert: Liquidated damages shall only be assessed against the Subcontractor to the extent due to the fault of the Subcontractor.



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Project Coordination

Insert: While Subcontractor will seek to coordinate its work with other subcontractors, the parties recognize that Subcontractor has no contract with or ability to control or direct or sequence the work of other subcontractors. Contractor has the primary responsibility to coordinate the work of subcontractors and trades and to sequence the work to facilitate construction.



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Backcharges

- ◆ Watch out for terms that allow the contractor to unilaterally assess backcharges well after the fact.



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Backcharges - Inserts

Insert: 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 provided Subcontractor is provided a reasonable opportunity to remedy and unless written notice is given to Subcontractor within five (5) days of the event, act or omission that is the basis of the backcharge.



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Building Code and Design

- ◆ Do not accept design responsibility!
- ◆ Watch out for “compliance with laws” provisions.
- ◆ Avoid clauses requiring compliance with code or specifications, “whichever imposes the greater duty.”



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Building Code and Design

– Examples and Inserts

Subcontractor shall comply with all applicable federal, state and local laws, statutes, regulations, ordinance and building codes, **provided the Contract Documents are in compliance therewith.**

Provide and install the work as specified per plans and local codes, **provided the Contract Documents are in compliance therewith.**

Subcontractor warrants that it has included everything of any type required for a complete project, in accordance with all applicable codes and ordinances, **provided the Contract Documents are in compliance therewith.**



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Building Code and Design - Insert

Insert: If Subcontractor discovers that the prescribed Work is not in accordance with codes, Subcontractor 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. Subcontractor is not responsible for design, including design errors or omissions.



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Contractual Notice Requirements

- ◆ Notice, Notice, Notice!
- ◆ “The squeaky wheel gets oiled!”
- ◆ Failure to give timely notice will constitute a waiver of the claim!



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Contractual Notice Requirements

- ◆ Identify and comply with all “early” notice requirements!
 - When is Notice Required?
 - ◆ Schedule impacts
 - ◆ Cost impacts
 - To Whom Must Notice Be Sent?
 - Must Notice Contain Specific Contents?
- ◆ Beware of notice triggering events!



Contractual Notice Requirements - Example

Subcontractor shall give Contractor notice of all claims affecting or relating to the Subcontract Price for which the Owner is or may be liable under the Contract Documents no later than 48 hours after the claim affecting or relating to the Subcontract Price.



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Contractual Notice Requirements - Response

Subcontractor shall give Contractor notice of all claims affecting or relating to the Subcontract Price for which the Owner is or may be liable under the Contract Documents no later than 48 hours after Subcontractor's **knowledge** of the facts giving rise to the claim. **Notice triggered upon subcontractor's knowledge of event or occurrence.**



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New Construction vs. Retrofit Projects

◆ Builder's Risk Insurance

- Property insurance that generally only covers construction work

◆ Retrofit or renovation work?

- What about coverage for existing structures?
- Builder's Risk Insurance with Existing Structure Endorsement



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New ICAA Standard Contract Clauses

- ◆ Proposals
- ◆ Scope of Work
- ◆ Insurance
- ◆ Payment
- ◆ Damages/Delays
- ◆ Changes in Work
- ◆ Material Cost Escalation

INSULATION CONTRACTOR TERMS AND CONDITIONS

1. Nature and Scope of Work. _____ ("INSULATION CONTRACTOR") shall furnish the labor and material to perform the Work described herein or in the referenced contract documents. INSULATION CONTRACTOR does not provide design, engineering, consulting, or architectural services. It is the Customer's responsibility to retain a licensed architect or engineer to determine proper design and code compliance. If plans, specifications, or other design documents have been furnished to INSULATION CONTRACTOR, Customer warrants that they are sufficient and conform to all applicable laws and building codes. INSULATION CONTRACTOR is not responsible for any loss, damage, or expense due to defects in plans or specifications or building code violations unless such damage results from a deviation by INSULATION CONTRACTOR from what is specified. INSULATION CONTRACTOR will perform work indicated on the plans and specifications furnished to INSULATION CONTRACTOR, including work that is reasonably inferred therefrom and customarily performed by insulation contractor even when that specific work item is not explicitly stated in the plans and specifications. INSULATION CONTRACTOR is not responsible to perform, without additional compensation, other work items that have not been included in INSULATION CONTRACTOR's scope of work as stated in the applicable sections of the plans and specifications.

2. Asbestos and Toxic Materials. This proposal is based on INSULATION CONTRACTOR not coming into contact with asbestos-containing or toxic materials ("ACM"). INSULATION CONTRACTOR is not responsible for expenses, claims or damages arising out of the presence, disturbance, or removal of ACM. INSULATION CONTRACTOR shall be compensated for additional expenses resulting from the presence of ACM. Customer agrees to indemnify INSULATION CONTRACTOR from and against any liability, damages, losses, claims, demands or citations arising out of the presence of ACM.

3. Payment. Unless stated otherwise on the face of this Proposal/Contract, Customer shall pay the Contract Price plus any additional charges for changed or extra work within ten (10) days of substantial completion of the Work. If completion of the Work extends beyond one month, Customer shall make monthly progress payments to INSULATION CONTRACTOR by the fifth (5th) day of the month for the value of Work completed during the preceding month, plus the value of materials suitably stored for the project. Retainage, if any, shall be paid by Customer to INSULATION CONTRACTOR within thirty (30) days after substantial completion of the Work. All sums not paid when due shall earn interest at the rate of 1% per month (12% per year). INSULATION CONTRACTOR shall be entitled to recover from Customer all costs of collection incurred by INSULATION CONTRACTOR, including attorneys' fees, resulting from Customer's failure to make proper payment when due.

4. Right to Stop Work. The failure of Customer to make proper payment to INSULATION CONTRACTOR when due shall, in addition to all other

6. Additional Insured. If Customer requires and INSULATION CONTRACTOR agrees to make Customer or others additional insureds on INSULATION CONTRACTOR's liability insurance policy, Customer and INSULATION CONTRACTOR agree that the naming of Customer or others as additional insureds is intended to apply to claims made against the additional insured to the extent the claim is due to the negligence of INSULATION CONTRACTOR and is not intended to make INSULATION CONTRACTOR's insurer liable for claims that are due to the fault of the additional insured.

7. Clean-up; Interior Protection. Customer acknowledges that insulation work to an existing building may cause disturbance, dust, debris or fireproofing to fall into the interior depending on existing building conditions. Customer agrees to remove or protect property in order to minimize potential interior damage. INSULATION CONTRACTOR shall not be responsible for clean-up disturbance, damage, clean up or loss to interior property that Customer did not remove or protect prior to commencement of work. Customer shall notify tenants of insulation work and the need to provide protection in the areas being work. Customer agrees to hold INSULATION CONTRACTOR harmless from claims of tenants who were not so notified and did not provide protection.

8. Unforeseen Conditions. Unforeseen conditions that may affect the Work will be reported to Customer and authorization requested prior to permanent repairs being performed. INSULATION CONTRACTOR shall be entitled to additional compensation and/or time as a result of such unanticipated or unforeseen conditions.

9. Damages and Delays/Force Majeure. INSULATION CONTRACTOR will not be responsible for damage to INSULATION CONTRACTOR's Work by others and INSULATION CONTRACTOR is not responsible for damage that occurs to its application after completion of the work. Any repairing of the same by INSULATION CONTRACTOR will be charged as an extra on a time and materials basis, and INSULATION CONTRACTOR's time for performance shall be extended for a time sufficient to make such repairs. INSULATION CONTRACTOR shall not be responsible for loss, damage or delay caused by circumstances beyond INSULATION CONTRACTOR's control, including but not limited to acts of God, pandemics, epidemics, quarantines, accidents, unavoidable casualties, snow, ice dams, fire, adverse weather, vandalism, regulation, strikes, jurisdictional disputes, disruption in supply chains, failure or delay of transportation, shortage of or inability to obtain materials or equipment or labor, changes in the Work and delays caused by others. If INSULATION CONTRACTOR is delayed in the commencement or prosecution of the Work for reasons beyond INSULATION CONTRACTOR's control, including delays due to weather conditions, INSULATION CONTRACTOR shall be granted reasonable additional time sufficient to complete the Work and an equitable adjustment in the Contract Price if additional costs are incurred.



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SALZMAN & SIEGEL PC
ATTORNEYS AT LAW

Thank You!



ANY QUESTIONS?

BENJAMIN S. LOWENTHAL
Hendrick, Phillips, Salzman & Siegel
230 Peachtree Street, N.W., Suite 2500
Atlanta, Georgia 30303
(404) 522-1410 ext. 121
bsl@hpsslaw.com



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