

BEST of SUCCESS

CRITICAL TRENDS IN TODAY'S CONTRACTS AND THE LEGAL ASPECTS OF SELLING YOUR BUSINESS

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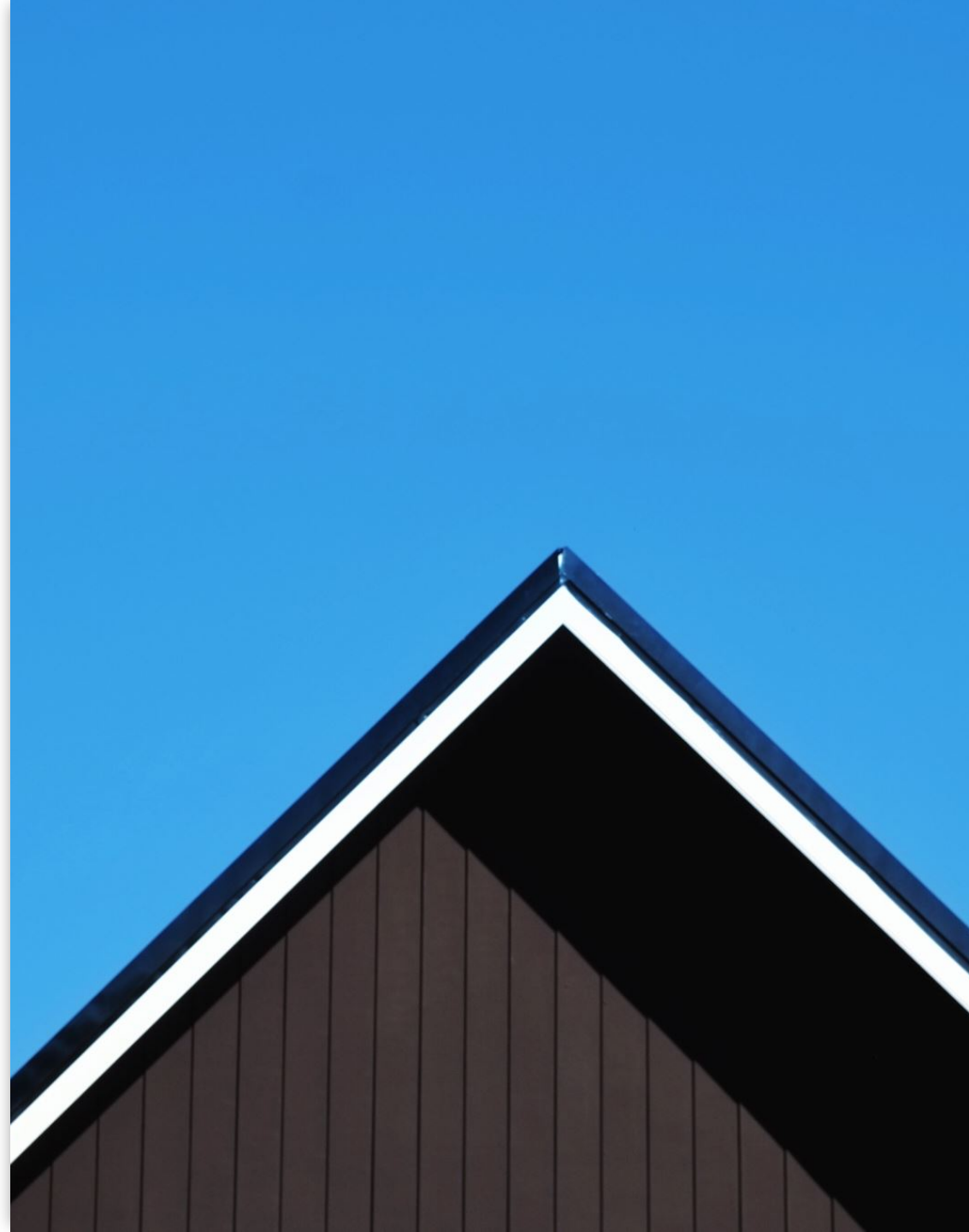


Critical Trends in Today's Contracts & Legal Aspects of Selling Your Business

by Trent Cotney

Introduction

- **Newest Contract Provisions for Residential and Commercial Roofing**
- **Preparing for the Sale of Your Business**
- **Understanding the Process and Key Legal Terms**



Design Liability

- Liability for design defects and the impact of the Spearin Doctrine.
- The Spearin Doctrine is the legal principle that states when a contractor follows the plans and specifications provided by the owner, the contractor is not liable to the owner for loss or damage caused by the defective plans and specifications.



Waiver of Design Liability

- **Regardless of any Contract Document provision to the contrary, Contractor shall not be held liable for any design defect on the project including, without limitation, defects or deficiencies with the plans, specifications, shop drawings, or performance criteria ("Design Defects"). Customer agrees to release the Contractor from any claims, damages, or losses arising out of or relating to Design Defects.**



Liability for Using Existing Drainage

Roof failures resulting from using existing drainage

Unless the scope of work of this contract includes replacement of the roof system's existing drainage, i.e., the existing drains, scuppers, downspouts, gutters, and other ancillary drainage components as may be applicable for the particular project ("Drainage"), Customer hereby agrees to and acknowledges that Contractor shall have no liability or responsibility for improper or inadequate functioning of the Drainage, or any damage arising out of, caused by, or related to same, including, but not limited to, water backup, ponding water, leaks, damage to the roof and areas adjacent thereto, as well as partial or complete roof collapse.

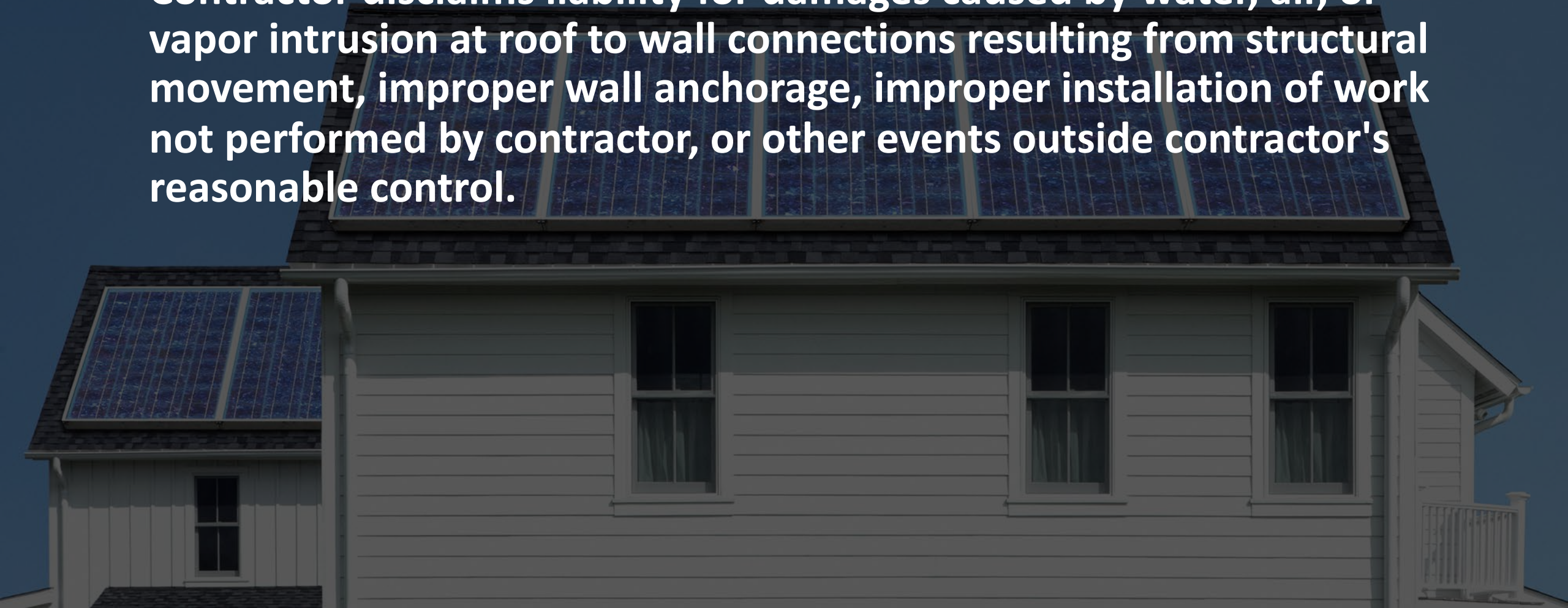


Bubble Test Disclaimer

- **Regardless of any requirement contained in FM 1-52 or anywhere else in the Contract Documents, Contractor shall not be required to perform a negative-pressure test, which is sometimes referred to as the "Bubble Test," to verify system performance, field uplift, or adhesion of the roofing membrane. Despite any language to the contrary in the Contract Documents, Customer shall not withhold any payment to Contractor for failure to perform negative-pressure testing on the roof. In addition, any use of a negative pressure test on the roof shall void all workmanship and manufacturer warranties.**

Roof to Wall Connections

- Contractor disclaims liability for damages caused by water, air, or vapor intrusion at roof to wall connections resulting from structural movement, improper wall anchorage, improper installation of work not performed by contractor, or other events outside contractor's reasonable control.



Acceptance of Deck

Contractor's commencement of roof installation indicates only that Contractor has visually inspected the top surface of the roof deck for visible defects. Contractor shall not be liable for the structural sufficiency, quality of construction, undulations, or moisture content of the roof deck.



Customer Notice Provision

- It is Customer's duty to notify Contractor in writing within **three (3) days** of the occurrence of any claim, defect or deficiency arising out of work, services or materials provided by Contractor under this Agreement ("Occurrence"). Failure of the Customer to provide written notice of the Occurrence shall result in the Customer waiving all claims that may be brought against Contractor arising out of or relating to the Occurrence, including claims arising in law, equity, contract, warranty (express or implied), tort or federal or state statutory claims.

Customer Back Charge Provision

- Customer's duty to pay Contractor is an unconditional and absolute obligation, and Customer shall not withhold any amount owed under the contract due to a pending or anticipated insurance claim. Any express warranty provided, if any, by Contractor is the sole and exclusive remedy for alleged construction defects, in lieu of all other available remedies.

Selling Your Business: What Makes Roofing Attractive?

- Low barriers to entry – or are there? Licensure, permits, ongoing liabilities (warranties, suits, etc.)
- Predictable, scaleable revenue
- Labor and equipment acquisitions
- Lack of sophistication
- Consolidation



Getting Ready for the Sale.

Organization and Corporate Documentation

- Governing documents – bylaws, operating agreement, articles of incorporation
- Business locations and business names
- Proper registrations – business license, properly registered to do business, etc.
- Identity of shareholders, officers, and directors
- Meeting minutes, corporate consents, etc.
- Corporate policies and procedures





Taxes

- Tax returns – state and federal
- Payroll taxes
- Sales taxes
- Any communication or outstanding liability with tax authority

Seller Financial Information

- Financial statements and projections
- Sales and revenue
- Cost analysis, balance sheet
- Budgets, cash flow
- Debt schedules
- Financing, security, and loan documents
- Auditor reports – certified financials
- Internal control policies and procedures
- Bank and investment accounts
- Real estate – owned or leased
- Inventory
- Equipment and tangible assets
- Intangible assets – customer lists, IP rights, software, social media, etc.



Contracts

Applicator
agreements

Credit agreements
– distribution and
manufacturers

Vendor
agreements

Independent
salesperson
agreements

Customer
contracts and
subcontracts

Leases, technology,
marketing, and
advertising
agreements

Restrictive Covenants

- Non-compete, non-solicitation
- Confidentiality, non-disclosure
- Indemnity agreements – surety
- Guarantees
- Exclusive arrangements



Insurance and Pending Claims

- CGL, Worker's Comp, Commercial Auto, Umbrella, Cyber, etc.
- If in a storm or restoration market, there is a separate detailed checklist that you want to engage in to determine if business practices comply with your state's laws.
- Pending or threatened claims



Do You Have the Right Mind Frame?

- Have you mentally prepared yourself for an exit?
- Have you thought about the future?
- Will you still be involved in operations? Do you still want to be involved in the company? Have you thought about the positives and the negatives?
 - License holder
 - Sales
 - Operations



Legal Documents in a M&A Deal

- Non-Disclosure Agreement (NDA) - critical document which provides confidentiality needed when disclosing documents
- Term Sheet, LOI, Memorandum of Understanding
- Purchase Agreement



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