IN THE SUPREME COURT OF THE STATE OF NEVADA

APCO CONSTRUCTION, INC., Appellant. vs. ZITTING BROTHERS CONSTRUCTION, INC., Respondent.	Case No. 75197 District Court Case No. 08A571228

PETITION FOR EN BANC RECONSIDERATION

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. APCO Construction, Inc. (APCO), is not owned by a parent corporation and no publicly traded company owns more than 10% of APCO's stock.

2. Over the course of the litigation, APCO was represented in the district court by Gwen Rutar-Mullins, Esq. and Wade Gochnour, Esq. of Howard & Howard; Micah Echols, Esq., Cody Mounteer, Esq., and Jack Juan, Esq. of Marquis Aurbach Coffing; and John Mowbray, Esq., John Randall Jefferies, Esq., and Mary Bacon, Esq. of Spencer Fane LLP.

3. Cody Mounteer, Esq., and Kathleen Wilde, Esq. of Marquis Aurbach Coffing; John Randall Jefferies, Esq., of Fennemore Craig; and Christopher H. Byrd, Esq. of Fennemore Craig represent APCO in this Court.

Dated this 6th day of January, 2021.

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I. PRELIMINARY STATEMENT IN SUPPORT OF EN BANC RECONSIDERATION

Appellant APCO Construction, Inc. ("APCO") petitions for en banc reconsideration of the Panel's October 8, 2020 Opinion ("Decision") denying its appeal. APCO filed a Petition for Rehearing of the Decision on November 23, 2020, which the Panel denied on December 23, 2020.

Specifically, APCO requests en banc reconsideration of the Decision's holding that the pay-if-paid provisions in APCO's subcontract with Zitting Brothers Construction, Inc. ('Zitting"), whereby Zitting agreed to be paid for its work only if APCO was paid by the project owner, are void as against public policy under NRS 624.628(3) because they resulted in Zitting forgoing its right to prompt payment under the Prompt Payment Act (codified at NRS 624.624 through 624.626).

En banc reconsideration should be granted when "necessary to secure and maintain uniformity of Nevada's [appellate court] decisions" or if a panel's order "involves a substantial precedential, constitutional or public policy issue." NRAP 40A(a); *see Bass-Davis v. Davis*, 122 Nev. 442, 444-45, 134 P.3d 103 (2006), *Parsons v. State*, 116 Nev. 928, 930, 10 P.3d 836, 837 (2000). APCO's Petition for En Banc Reconsideration should be

granted because the Decision conflicts with a prior en banc decision of this Court and creates substantial precedential and public policy issues that have not been addressed.

First, full Court reconsideration of the Panel's Decision is necessary to secure and maintain uniformity of the decisions of this Court. In *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1117 n. 50, 197 P.3d 1032, 1042 n. 50 (2008), this Court concluded that pay-if-paid provisions in construction contracts could still be enforceable following the Legislature's enactment of the prompt payment provisions contained in NRS 624.624 through 624.630—known as the Prompt Payment Act ("Act"). However, the practical effect of the Panel's Decision is to hold *all* pay-if-paid provisions in construction contracts unenforceable ***in direct contravention of this Court's previous en banc opinion in Lehrer***.

Second, the Decision misinterprets sections NRS 624.624(1) and NRS 624.628(3)(a) of the Act to provide a guaranty for payment by APCO to Zitting despite a contractual agreement between the parties that Zitting would not be paid unless and until APCO received payment from the owner and that APCO and Zitting would jointly assume the risk of owner insolvency. The Decision's misinterpretation of the Act creates substantial

public policy issues that the Decision fails to address, but which will have a negative and wide ranging impact on the Nevada construction industry, beyond the litigants in this case.

The Decision also overlooks other provisions of the Act which expressly authorize pay-if-paid clauses (NRS 624.626(1)(b) (setting a different time schedule for a lower-tiered subcontractor to stop work for nonpayment where the parties have entered into a pay-if-paid clause) and NRS 624.626(2) (not allowing a lowered-tiered subcontractor who stopped work for nonpayment to terminate a contract containing a pay-if-paid clause)). Thus, the Decision, if allowed to stand, will cause internal inconsistencies within the Act, ***allowing pay-if-paid clauses to be enforceable under one section of the Act and yet simultaneously holding them to be a violation of public policy and void under another section the Act***.

II. BRIEF FACTUAL BACKGROUND

The genesis of this case is a failed, large-scale condominium construction project, Manhattan West, whose owner and developer, Gemstone Development West, Inc. ("Gemstone"), lost financing and

stopped work prior to the project's completion. As a result, the project's contractors—including APCO, and its subcontractor, Zitting—went unpaid.

In late 2007, Gemstone hired APCO as the prime contractor for Manhattan West. 8 AA 1874-1916. APCO hired Zitting as a subcontractor to provide framing materials and labor at Manhattan West. 9 AA 1918-1950. The Zitting subcontract set forth, among other things, that Zitting would be paid per building, subject to certain conditions precedent to payment, and subject to a "pay-if-paid" restriction—meaning that "[a]ny payments to [Zitting] [were] conditioned upon receipt of the actual payments by APCO from [Gemstone]." 9 AA 1920. Zitting's retention payments and any change order payments were also conditioned upon payment by Gemstone to APCO. 9AA1921. Besides agreeing to this pay if paid condition and payment schedule, Zitting "agree[d] to assume the same risk that [Gemstone] may become insolvent that [APCO] assumed by entering into" the prime contract. 9 AA 1920-1921. Finally, the subcontract specified that, if the prime contract was terminated, "[Zitting] shall be paid the amount due from [Gemstone] to [APCO] for [Zitting]'s completed work . . . after payment by [Gemstone] to [APCO]." 9 AA 1929.

In late 2007, work began on Manhattan West. 8 AA 1834. However,

in mid-2008, Gemstone purported to terminate APCO's prime contract and stopped paying APCO for its work on Manhattan West. 8 AA 1867. As a result, on August 21, 2008, APCO stopped worked on the project and provided written notice of its intent to stop work to the subcontractors, including Zitting. 8 AA 1864-1867. The unpaid amounts owed by Gemstone to APCO included amounts Zitting claimed to be owed. 8 AA 1864. Following APCO's departure, APCO assigned to Gemstone all of the subcontracts, including Zitting's subcontract, and Gemstone hired a new prime contractor to replace APCO. 8 AA 1909. Zitting continued work on Manhattan West after APCO left, and did not leave the project until December 2008, when Manhattan West's lender stopped funding the project and all contractors ceased work. In total, APCO lost nearly $8,000,000 on the job. 17 AA 3868-3869.

In the immediate aftermath of the project's failure, contractors and subcontractors—***including Zitting***—filed competing mechanics' liens on the property and began litigating lien priority against Gemstone's lender. Ultimately, this Court held in favor of the lender, and determined "the

priority of the mechanic's lien[s] remains junior to the amount secured by the original senior lien."[1]

Following the priority determination, a statutory foreclosure sale occurred, and the proceeds went to Gemstone's lender. Zitting then pursued APCO for amounts allegedly owed for retention and change orders that Gemstone failed to pay to APCO. 4 AA 793-810. The district court limited APCO's defense to the pay-if-paid clauses in the subcontract and found those clauses to be illegal and unenforceable as against public policy, but "without considering the specific contract terms and whether the provisions were permitted under statute." Decision, 9, 14 AA 3239-49. The district court granted Zitting's motion for partial summary judgment and later certified it as a final judgment under NRCP 54(b). Zitting obtained a judgment for more than $900,000 against APCO in addition to fees and costs as a prevailing lien claimant. 14 AA 3239-3249, 25 AA 5872-26 AA 6038.

III. ARGUMENT

A. The Panel's Decision Conflicts with This Court's En Banc Opinion in *Lehrer*.

In *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc*., 124 Nev.

[1]*In re Manhattan W. Mech.'s Lien Litig*., 131 Nev. 702, 706, 359 P.3d 125, 128 (2015).

1102, 1118 n. 50, 197 P.3d 1032, 1042 n.50 (2008), this Court stated

> We note that in 2001, the Legislature amended NRS Chapter 624 to include the prompt payment provisions contained in NRS 624.624 through 624.626. Pay-if-paid provisions entered into subsequent to the Legislature's amendments are enforceable only in limited circumstances and are subject to the restrictions laid out in these sections.

Thus, this Court previously concluded that the Act ***did not*** render all pay-if-paid provisions in constructions contracts unenforceable.

Although the Panel's Decision purports to clarify any confusion arising from *Lehrer* by stating that "pay if paid provisions entered subsequent to the Legislature's 2001 amendments are not per se unenforceable," the effect of the Decision is to in fact render ***all*** pay-if-paid provisions in construction contracts void—in direct contravention of this Court's previous en banc decision in *Lehrer*. Decision, 9.

The Panel's Decision holds that NRS 624.628(3) protects a subcontractor's statutory rights, one of which is prompt payment under NRS 624.624 for labor, materials and equipment, by making any contract provision which limits those rights against public policy and void and unenforceable. Decision, 7. The Decision then goes on to find that because Zitting would not be paid for its work unless Gemstone paid APCO, even if

Gemstone approved the work, the pay if paid provisions in Zitting's subcontract limited Zitting's right to prompt payment under NRS 624.624(1) and were therefore void and unenforceable. Decision 10. However, the Decision fails to consider that all pay if paid provisions, not just those in Zitting's subcontract, condition a subcontractor's right to payment for work performed on payment from the owner to the general contractor. Thus, despite the Decision's express desire to clarify that pay if paid provisions are not per se unenforceable, the Decision holds just the opposite.

The Decision's holding not only conflicts with this Court's previous en banc opinion, but also internally conflicts with the statements within the Decision that not all pay-if-paid provisions should be rendered per se void and unenforceable. En banc reconsideration of the Decision is therefore warranted as this Decision will have a disastrous impact upon the construction industry in Nevada .

B. The Panel's Decision Misinterprets and Overlooks Portions of the Prompt Payment Act.

The Decision fails to give effect to all of the provisions of the Act while reading language and requirements into the Act that the Legislature did not include. Given the widespread impact of the Decision on the Nevada

construction industry and the Decision's importance as the first appellate opinion seeking to clarify *Lehrer* and the Act, en banc reconsideration should be granted to ensure that the Decision has correctly interpreted the Act.

First, the Decision reads language and requirements into the Act that the Legislature did not include. Based on the Act's purported purpose of ensuring that "subcontractors [] be paid in a timely manner," the Decision concludes "that the pay-if-paid provisions in the subcontract are unenforceable under NRS 624.628(3)(a) because they limit Zitting's rights to prompt payment under NRS 624.624(1)." Decision, 8, 9. To the contrary, NRS 624.624(1)(a) provides:

> Except as otherwise provided in this section, if a higher-tiered contractor enters into . . . A written agreement with a lower-tiered subcontractor that includes a schedule for payments, the higher-tiered contractor shall pay the lower-tiered subcontractor:
>
> (1) On or before the date payment is due; or
>
> (2) Within 10 days after the date the higher-tiered contractor receives payment for all or a portion of the work, materials or equipment described in a request for payment submitted by the lower-tiered subcontractor,
>
> whichever is earlier.

Finding that Zitting's subcontract contained a payment schedule, the Panel determined that NRS 624.624(1)(a) applied in this case. Decision, 10.

Applying statutory interpretation principles, NRS 624.624(1)(a) must be interpreted to mean what it says: where a written subcontract contains a payment schedule, payment must be made "on or before the date payment is due" or within ten days after the higher-tiered subcontractor received payment for all or a portion of the work or materials provided by the subcontractor. *See Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007) (holding when a statute's language is plain and unambiguous, this Court applies the statute's plain language). Nothing in NRS 624.624(1)(a), nor any other language contained in NRS 624.624-630, eliminates the parties' right to enter into an express contractual agreement to make the owner's payment of the higher-tiered contractor the trigger date for "the date payment is due".

Rather, what NRS 624.624(1)(a) requires is that the higher-tiered contractor (APCO) must either pay the lower-tiered subcontractor (Zitting) on the date agreed-upon by the parties, but in any case no later than 10 days after the higher-tiered contractor receives payment for the lower-tiered contractor's work and/or materials. Therefore, under NRS 624.624(1)(a) APCO would not be permitted to collect money from the owner for work performed by Zitting and then wait several months to pay Zitting for that

same work.

Nothing in the Act prohibits parties from entering into contractual pay-if-paid provisions. The Legislature certainly could have included an explicit prohibition of pay if paid clauses in the Act but instead chose to recognize payment schedules triggered by the owner's payment.

This Court has previously acknowledged that under the language of NRS 624.624(1)(a) parties can properly enter into contractual pay-if-paid provisions—even where the result is that the subcontractor is not paid for its work. In a case cited by the Panel in its Decision, *Padilla Constr. Co. of Nev. v. Big-D Constr. Corp.*, Docket Nos. 67397 & 68683 (Order of Affirmance, Nov. 18, 2016), this Court concluded that:

> [b]ecause the parties' subcontract contained a payment schedule that required that Padilla be paid within ten days after IGT accepted Padilla's work and paid Big-D for that work and it is undisputed that IGT never accepted Padilla's work and never paid Big-D for Padilla's work, the district court correctly found that payment never became due to Padilla under the subcontract or NRS 624.624(1)(a). Order of Affirmance, 3-4.

Thus, this Court has previously properly determined pay-if-paid provisions do not violate NRS 624.624(1)(a).

Second, the Decision fails to take into account internal inconsistencies

within the Act that will exist under the Decision's current holding.

The Decision's de novo review of the Act overlooked a fundamental principle of statutory construction that legislative enactments are read as a whole. "No part of the statute [may] be rendered meaningless and language should not be read to produce absurd results." *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct. ex rel. County of Clark*, 123 Nev. 468, 476, 168 P.3d 731, 738 (2007). When interpreting a statue, the Court "shall read each sentence, phrase and word to render it meaningful within the context of the purpose of the legislation." *Harris Assoc. v. Clark County School Dist.* 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). "The Court must look to will of the Legislature as embodied in the statutes to determine the public policy of the state". *Siloam Springs Hotel, LLC v. Century Sur. Co.*, 392 P3d 262, 268 (Okla. 2017) (Internal citations omitted). "Courts will exercise their power to nullify contracts made in contravention of public policy only rarely, with great caution and in cases that are free from doubt." *Id*. "Where the Legislature has directly addressed the question…on grounds of public policy the court is bound to carry out the legislative mandate with respect to the enforceability of the term." *Pina v. Gruy Petroleum Mgmt. Co.*, 136 P.3d 1029, 1033 (N.M. Ct. App. 2006)(Internal quotations omitted). Thus, the

Decision was not free to substitute the Panel's judgment for that of the Legislature and ignore NRS 624.626 and the policy of the Act accepting pay-if-paid clauses.

Without question the Act expressly permits the use of pay-if-paid clauses in a subcontract. When a subcontract contains a pay-if-paid clause the Act has different rules for stopping work and terminating the subcontract for nonpayment. Thus, the Decision's holding that pay-if-paid clauses are void under NRS 624.628(3)(a) renders meaningless a material portion of the Act, NRS 624.626(1)(b), and provides a termination remedy not permitted by NRS 624.626(2).

The holding of the Decision cannot be reconciled with the Legislature's acknowledgement that subcontracts with pay-if-paid clauses have to be treated differently when determining a subcontractor's right to stop work for non-payment. Under the Act, putting aside the issues of failure to notify that are not relevant to this case, the right of a subcontractor to stop work is triggered if the subcontractor is not paid in accordance with NRS 624.624(1) unless there is a pay-if-paid clause in the subcontract. Compare NRS 624.626(1)(a) with NRS 624.626(1)(b). Because a pay-if-paid clause in a subcontract prevents payment from being due under NRS

624.624(1)(a) for work performed if the general contractor has not been paid, even if the work is accepted by the owner, NRS 624.626(1)(b) establishes a date when the subcontractor can nonetheless stop work. NRS 624.626 provides in pertinent part as follows:

> 1. If:
> (a) A higher-tiered contractor fails to pay the lower-tiered subcontractor within the time provided in subsection 1 or 4 of NRS 624.624;
> (b) A higher-tiered contractor fails to pay the lower-tiered subcontractor within 45 days after the 25th day of the month in which the lower-tiered subcontractor submits a request for payment, **even if the higher-tiered contractor has not been paid and the agreement contains a provision which requires the higher-tiered contractor to pay the lower-tiered subcontractor only if or when the higher-tiered contractor is paid**;
> **…the lower-tiered subcontractor may stop work under the agreement until payment is received if the lower-tiered subcontractor gives written notice to the higher-tiered contractor at least 10 days before stopping work**.

Once a subcontractor stops work for nonpayment, the Act provides an additional remedy that allows a subcontractor to terminate its subcontract, unless the subcontract has a pay if paid clause. NRS 624.626(2) does not afford a termination remedy to an unpaid subcontractor who stopped work under paragraph (b) above when the owner has not paid the general

contractor and the subcontract has a pay if paid clause. The Legislature recognized that under those circumstances the general contractor is not in breach of the subcontract so there can be no termination right when it excluded paragraph (b) from the termination provision:

> 2. **If a lower-tiered subcontractor stops work pursuant to paragraph (a), (c) or (d) of subsection 1, the lower-tiered subcontractor may terminate the agreement with the higher-tiered contractor** by giving written notice of the termination to the higher-tiered contractor after stopping work but at least 15 days before the termination of the agreement. NRS 624.626.

If pay-if-paid clauses are void and not enforceable under NRS 624.628(3)(a) as the Decision held, there would be no need for NRS 624.626(1)(b) to establish a separate time frame for stoppage of work when a subcontract contains pay-if-paid provisions, nor would there be a need to exclude such subcontracts from the termination remedy under NRS 624.626(2). By creating separate rules for subcontracts with pay if paid provisions the Legislature recognized that the purpose of Act and its underlying public policy are not violated by pay-if-paid provisions. If pay-if-paid clauses are invalid under NRS 624.628(3)(a), as the Decision held, they would have to be invalid for all purposes under the Act, including when the right to stop

work is triggered and whether a termination remedy exists, which is clearly not the case.

Instead, the Legislature struck a balance between the right of the subcontractor to stop work and the right of the general contractor to have the benefit of the subcontract's pay-if-paid provisions so as to not be sued for non-payment upon termination of the subcontract. NRS 624.626 provides the subcontractor leverage to induce the owner to pay the general contractor, and at the same time protects the general contractor from a suit for payment that would turn the general contractor into the owner's guarantor or lender.

The Decision's finding that pay if paid clauses are void, despite NRS 624.626(1)(b)'s approval of such clauses, also resulted in APCO being liable under NRS 108.239(12) as the party "legally liable" when proceeds from the sale of property are insufficient. But this result is predicated on the Decision's refusal to interpret the Act as written.

Therefore, in order to comply with all of the terms of the Act the Decision holding pay-if-paid clauses void under NRS 624.628(3)(a) should be reversed because it makes pay-if-paid clauses void for one purpose under the Act but not others, affords Zitting a termination remedy for nonpayment that the Act does not permit and results in unintended liability under the

mechanics' lien statues for general contractors.

Third, without explanation, the Decision holds that the pay-if-paid provisions of Zitting's subcontract impermissibly impaired Zitting's mechanics' lien rights. Decision, 10. The Decision overlooks the fact that, unlike the subcontract in *Lehrer*, Zitting's subcontract did not contain a provision that required Zitting to waive its lien rights. Compare, *Lehrer*, 197 P.3d 1040-1044 (subcontractor promised not to have any liens filed against the property), with Zitting Subcontract, 9 AA 1920-1921.

The Decision also overlooks that there is nothing in the mechanics' lien statute, Chapter 108, that requires money to be immediately due in order to record a mechanics' lien. NRS 108.22136 defines "lienable amount" as the principal amount of a lien to which lien claimant is entitled pursuant to subsection 1 of 108.222. NRS 108.222(1)(a) defines the "lienable amount" as the "unpaid balance of the price agreed upon" for the work. Nothing in Chapter 108 governing liens requires the unpaid balance to be immediately due. Thus, the fact that the pay-if-paid clause resulted in nonpayment to Zitting when APCO was not paid for work performed did not bar Zitting's right to record a lien.

It is undisputed that Zitting recorded and pursued its lien rights in this

case. This is evidenced by the Decision's holding that APCO was liable under NRS 108.239(12) as the party "legally liable" when proceeds from the sale of property are insufficient. Decision, 14-15. That Zitting—along with APCO and many other contractors and subcontractors—were unable to recover on their liens from the owner of the project was not as a result of any actions by APCO. *See In re Manhattan W. Mech.'s Lien Litig*., 131 Nev. 702, 706, 359 P.3d 125, 128 (2015).

The Decision makes APCO responsible for the owner's bad business decisions and the lender's decision to stop funding and to take all of the equity in the property through foreclosure. Decision, 14-15. As the Decision correctly noted, the Court's decision in *In Re Manhattan West Lien Litigation*, 359 P.3d 125 (2015), awarded all of proceeds from the sale of the partially completed project to Scott Financial, leaving APCO and Zitting unpaid. Decision, 4 n. 1. As a result, APCO lost nearly $8,000,000 on this project, not including claims by Zitting and other subcontractors for payment[2]. 17 AA 368-369; Opening Brief, 15.

Moreover, the Decision's suggestion that public policy requires

[2]APCO went to trial against other subcontractors and prevailed. Opening Brief, 4 n 4. *Helix Electrical v. APCO*, Docket Nos. 77320/80508, presents similar issues from the same Gemstone project and a similar subcontract agreement. In that case the trial court found the pay-if-paid clause to be valid, but Helix's current appeal of that decision is based in part on the Decision in this case.

APCO, as the general contractor, to be liable to its subcontractor Zitting because APCO can pursue the owner for recovery fails to consider that Zitting also had the right to pursue the owner for non-payment under a lien and a theory of unjust enrichment. *Leasepartners Corp. v. Robert L. Brooks Tr. Dated November 12, 1975*, 113 Nev. 747, 756, 942 P.2d 182, 187 (1997). Thus, there is no public policy that is served by shifting the burden of an insolvent owner to APCO based upon APCO's right to recover from the owner. Zitting had the same right to recover, and Zitting expressly agreed to accept the same risk of owner insolvency as APCO by the terms of the subcontract. 9 AA 1920-1921.

C. The Panel's Decision Ignores Public Policy Issues that Will Have Industry-Wide Impact Well Beyond the Litigants and the Zitting Subcontract.

The Decision fails to address several public policy issues that arise if pay if paid clauses are unenforceable. First, when a project fails the Decision essentially makes the general contractor the owner's financial partner and guarantor, even though the general contractor has no equity in the project if the project is successful, and never contractually agreed to guaranty payment of the owner's obligations. In addition, if the losses from a failed project are unfairly shifted from the project owner to the general

contractor, and that contractor fails because it does not have the financial capability to pay the owner's bills, it impacts other project owners who use the same contractor and now have to find a replacement. Such results were never intended by the Act. The Act was intended, in part, to insure prompt payment from general contractors to subcontractors **once the owner paid the general contractor**. The Act was not intended to make general contractors de facto guarantors for failed construction projects by forcing general contractors to pay for the owner's mistakes in either building or financing the project.

Second, because projects fail for a myriad of reasons, there is no way for a general contractor to anticipate a project's failure or to include a dollar amount in the bid to offset that risk. If a general contractor increased its bid to account for a failed project, it would only increase construction costs for every project and result in a windfall payment to the general contractor if the project was successfully completed. Moreover, unless the general contractor could bill and collect money for the risk of failure at the start of the project, once the project fails the general contractor still has no money from the owner to pay subcontractors regardless of an increased bid amount.

Finally, the Decision does not consider the effect of declaring pay if

paid clauses unenforceable on existing contracts and the adverse effect on the financial stability of general contractors throughout Nevada who have executed subcontract agreements reasonably relying upon the protection of pay if paid clauses, based upon this Court's prior decisions in *Lehrer* and *Big-D Constr. Corp*. (*Padilla*) and the plain language of the Act as discussed above. After the Decision, subcontractors, who agreed to pay if paid clauses and accepted the same risk of owner insolvency as the general contractor, receive a windfall if the project fails because the Decision makes the general contractor liable for all subcontractor payments.

None of these results is fair, good public policy, or required by the plain language of the Act. At the very least, if the Decision is not overturned, it should only be given prospective application to prevent such unfair and unintended results. See, *Breithaupt v. USAA Prop. & Cas. Ins. Co.*, 110 Nev. 31, 35, 867 P.2d 402, 405 (1994).

IV. CONCLUSION

For the reasons set forth above APCO respectfully requests that the Court grant en banc reconsideration of the Panel's Decision, find that the pay if paid clauses in Zitting's subcontract are enforceable and reverse the Judgment against APCO.

Alternatively, the Decision should be applied prospectively and not to the parties in this case.

Dated this 6th day of January, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font in Times New Roman. I further certify that this petition complies with the type-volume limitation of NRAP 32(a)(7) as **it contains 4,332 words.**

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record be supported by appropriate references to the record on appeal.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of January, 2021.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 6th day of January, 2021 and was served electronically in accordance with the Master Service List and via the United States Mail, first class, postage prepaid, addressed as follows:

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