

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 Electronically Filed
4 Jun 29 2020 05:11 p.m.
5 Elizabeth A. Brown
6 Clerk of Supreme Court

7 APCO CONSTRUCTION, INC., A
8 NEVADA CORPORATION; AND
9 SAFECO INSURANCE COMPANY
10 OF AMERICA,

Case No. 80177
District Court Case No. A730091

11 Appellants,

12 vs.

13 HELIX ELECTRIC OF NEVADA,
14 LLC, A NEVADA LIMITED
15 LIABILITY COMPANY,

16 Respondent.

17 **APPELLANTS APCO CONSTRUCTION, INC. AND**
18 **SAFECO INSURANCE COMPANY OF AMERICA'S**
19 **RESPONSE TO ORDER TO SHOW CAUSE**

20 **FENNEMORE CRAIG, P.C.**

John Randall Jefferies, Esq.

Nevada Bar No. 3512

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21 *Attorneys for Appellants APCO Construction, Inc.*
22 *and Safeco Insurance Company of America*

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1 On July 8, 2019, the district court entered its Findings of Fact and
2 Conclusions of Law, finding in favor of Helix on its Breach of Contract,
3 Breach of the Covenant of Good Faith and Fair Dealing, Violation of NRS
4 338.550 and Claim Against Bond claims. *See Exhibit 2, July 8, 2019,*
5 *Findings of Fact and Conclusions of Law at pp. 22-23.* The district court
6 dismissed Helix's Unjust Enrichment or in the Alternative Quantum Meruit
7 claim. *Id. at p. 23.* Notice of Entry of the district court's July 8, 2019,
8 Findings of Fact and Conclusions of Law was filed on and served on July 10,
9 2019. *See Exhibit 3, July 10, 2019, Notice of Entry of Order.*

10 Appellants filed a Motion for Clarification and/or Amendment to
11 Findings of Fact and Conclusions of Law ("Motion for Clarification")
12 pursuant to NRCP 52(b) on July 15, 2019. *See Exhibit 4, APCO*
13 *Construction Inc.'s and Safeco Insurance Company of America's Motion for*
14 *Clarification and/or Amendment to Findings of Fact and Conclusions of*
15 *Law.* The Motion for Clarification requested that the district court reconsider
16 and/or amend the district court's damages calculation for the damages
17 awarded for Helix's Breach of Contract and Breach of the Implied Covenant
18 of Good Faith and Fair Dealing claims. *Id.*

19 ///

1 Helix opposed the Motion for Clarification and filed a Countermotion
2 for Amendment to Findings of Fact and Conclusions of Law
3 (“Countermotion”). *See Exhibit 5, Helix Electric of Nevada, LLC’s (I)*
4 *Opposition to APCO Construction Inc.’s and Safeco Insurance Company of*
5 *America’s Motion for Clarification and/or Amendment to Findings of Fact*
6 *and Conclusions of Law; and (II) Countermotion for Amendment to Findings*
7 *of Fact and Conclusions of Law.* The Countermotion requested that the
8 district court amend its damages calculations for Helix’s Breach of Contract,
9 Breach of the Implied Covenant of Good Faith and Fair Dealing, and
10 Violation of NRS 338.550 claims. *Id.*

11 A hearing on both the Motion to Amend and the Countermotion was
12 held on August 19, 2019. The district court thereafter issued its Final
13 Judgment on November 6, 2019. *See Exhibit 6, November 6, 2019, Final*
14 *Judgment.* The district court denied both the Motion to Amend and the
15 Countermotion. *Id.*

16 The district court also restated the findings in its July 8, 2019, Findings
17 of Fact and Conclusions of Law regarding Helix’s Breach of Contract,
18 Breach of the Implied Covenant of Good Faith and Fair Dealing and
19 Violation of NRS 338.550 claims—the only claims for which it awarded

1 damages and the only claims which the parties challenged in the Motion to
2 Amend and the Countermotion.¹ *Id.* The Final Judgment did not address
3 either Helix's Unjust Enrichment or in the Alternative Quantum Meruit or
4 Claim Against Bond claims, which were previously resolved in the district
5 court's July 8, 2019, Findings of Fact and Conclusions of Law and not
6 challenged in either the Motion to Amend or Countermotion. *Id.*

7 Notice of Entry of the Final Judgment was also filed and served on
8 November 6, 2019. *See Exhibit 7, November 6, 2019, Notice of Entry of*
9 *Final Judgment.* Appellants thereafter timely filed their Notice of Appeal on
10 December 6, 2019. *See Exhibit 8, December 6, 2019, Notice of Appeal.*

11 **DISCUSSION**

12 When the district court entered its Findings of Facts and Conclusions
13 of Law on July 8, 2019, it resolved all of the outstanding claims at issue in
14 the case. *See Exhibit 2.* The Findings of Facts and Conclusions of Law was
15 therefore a final judgment pursuant to NRAP 3A(b)(1) ("An appeal may be
16 taken from the following judgments and orders of a district court in a civil
17 action: . . . (1) A final judgment entered in an action or proceeding

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¹As discussed previously, the only challenges to these claims brought by the parties was as to the amount of damages awarded by the district court.

1 commenced in the court in which the judgment is rendered”).

2 Appellants thereafter timely² filed an NRCP 52(b) motion, requesting
3 that the district court amend its damages calculations as to two of those
4 claims—Breach of Contract and Breach of the Covenant of Good Faith and
5 Fair Dealing. *See Exhibit 4; see also* NRCP 52(b). Appellants’ NRCP 52(b)
6 motion served to toll the time to file the notice of appeal from the final
7 judgment, the Findings of Facts and Conclusions of Law. NRAP 4(a)(4)(B)
8 (“If a party timely files in the district court any of the following motions
9 under the Nevada Rules of Civil Procedure, the time to file a notice of appeal
10 runs for all parties from entry of an order disposing of the last such remaining
11 motion, and the notice of appeal must be filed no later than 30 days from the
12 date of service of written notice of entry of that order: . . . (B) a motion under
13 Rule 52(b) to amend or make additional findings of fact”).

14 Appellant’s Motion to Amend—and the Countermotion filed by
15 Helix—both challenged only the district court’s calculation of damages
16 awarded for Helix’s Breach of Contract, Breach of Implied Covenant of

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18 ²Notice of Entry of the Findings of Fact and Conclusion of Law was entered
19 on July 10, 2019. *See Exhibit 3*. Appellant’s NRCP 52(b) motion was filed
on July 15, 2019, within 28 days from service of notice of entry of the
judgment as required by NRCP 52(b). *See Exhibit 4*.

1 Good Faith and Fair Dealing, and Violation of NRS 338.550 claims. *See*
2 *Exhibits 4 and 5*. These tolling motions were resolved when the district court
3 entered its Final Judgment on November 6, 2019 denying both of the
4 motions. *See Exhibit 6*. Although the Final Judgment did not mention either
5 Helix's Unjust Enrichment or Claim on Bond claims, neither of those claims
6 were challenged in either of the tolling motion.

7 The fact that neither the Unjust Enrichment or Claim on Bond claims
8 were mentioned in the Final Judgment did not effect the finality of the July 8,
9 2019, Findings of Fact and Conclusions of Law, in which the district court
10 resolved both of those claims, along with all of the rest of Helix's claims in
11 this matter. *See Exhibit 2*. The district court's Findings of Fact and
12 Conclusions of Law resolved all the outstanding claims in this matter and
13 was the final judgment for purposes of appeal. NRAP 3A(b)(1)

14 The Notice of Entry of the Final Judgment was served on November 6,
15 2019. Appellants thereafter timely filed their Notice of Appeal on December
16 6, 2019. *See Exhibit 8*; NRAP 4(a)(4)(B) (notice of appeal must be filed no
17 later than 30 days from the date of service of written notice of entry of order
18 on a motion brought under NRCp 52(b)).

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Thus, the tolling motions in this matter have been resolved by formal written order of the district court and no claims remain pending in the district court. Further, Appellants' Notice of Appeal was timely filed after the resolution of the tolling motions by written order. This Court therefore has jurisdiction over Appellants' appeal.

CONCLUSION

Appellants respectfully requests that this Court conclude that it has jurisdiction over the appeal.

DATED this 29th day of June, 2020.

FENNEMORE CRAIG, P.C.

BY: /s/ Christopher H. Byrd

John Randall Jefferies, Esq.
Nevada Bar No. 3512
Christopher H. Byrd, Esq.
Nevada Bar No. 1633

*Attorneys for Appellants APCO Construction, Inc.
and Safeco Insurance Company of America*

EXHIBITS

Exhibit No.	<u>Pleading</u>
1	Helix Electric, LLC's Complaint
2	July 8, 2019, Findings of Fact and Conclusions of Law
3	July 10, 2019, Notice of Entry of Findings of Fact and Conclusions of Law and Order
4	APCO Construction, Inc.'s and Safeco Insurance Company of America's Motion for Clarification and/or Amendment to Findings of Fact and Conclusions of Law
5	Helix Electric of Nevada, LLC's (I) Opposition to APCO Construction Inc.'s and Safeco Insurance Company of America's Motion for Clarification and/or Amendment to Findings of Fact and Conclusions of Law; and (II) Countermotion for Amendment to Findings of Fact and Conclusions of Law.
6	November 6, 2019, Final Judgment
7	November 6, 2019, Notice of Entry of Final Judgment
8	December 6, 2019, Notice of Appeal

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*Attorneys for Helix Electric of
 Nevada, LLC*

An employee of Fennemore Craig P.C.

Exhibit 1

Exhibit 1

DISTRICT COURT CIVIL COVER SHEET

A-16-730091-C

County, Nevada

XVI I

Case No.

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): Helix Electric of Nevada, LLC	Defendant(s) (name/address/phone): APCO Construction; Safeco Insurance Company of America
Attorney (name/address/phone): Cary B. Domina, Esq. Peel Brimley LLP 3333 E. Serene Avenue, Suite 200 Henderson NV 89074 702-990-7272	Attorney (name/address/phone):

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

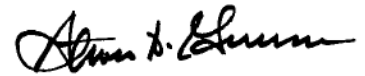
Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input checked="" type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

1/12/16
Date

 Signature of initiating party or representative

See other side for family-related case filings.



CLERK OF THE COURT

RICHARD L. PEEL ESQ.
Nevada Bar No. 4359
CARY B. DOMINA, ESQ.
Nevada Bar No. 10567
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Attorneys for Plaintiff Helix Electric of Nevada, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

HELIX ELECTRIC OF NEVADA, LLC, a
Nevada limited liability company,

CASE NO.: A- 16- 730091- C
DEPT. NO.:

Plaintiff,

XVI I

vs.

COMPLAINT

APCO CONSTRUCTION, a Nevada
corporation; SAFECO INSURANCE
COMPANY OF AMERICA; DOES I through X;
and BOE BONDING COMPANIES I through X,

Defendants.

Plaintiff, HELIX ELECTRIC OF NEVADA, LLC ("Helix"), by and through its attorneys of record, Richard L. Peel, Esq. and Cary B. Domina, Esq. of the law firm of PEEL BRIMLEY LLP, as for its Complaint against the above-named Defendants complains, avers and alleges as follows below:

THE PARTIES

1. Helix is and was at all times relevant to this action a Nevada limited liability company, duly authorized and qualified to do business in Clark County, Nevada as a duly licensed contractor holding a Nevada State Contractor's License.

2. Helix is informed and believes and therefore alleges that Defendant APCO CONSTRUCTION, ("APCO") is and was at all times relevant to this action a Nevada corporation, duly authorized and qualified to do business in the state of Nevada, as a contractor holding a Nevada State Contractor's license.

3. Helix is informed and believes and therefore alleges that Defendant SAFECO INSURANCE COMPANY OF AMERICA ("Safeco") is and was at all times relevant to this action a bonding company duly licensed and qualified to do business as a surety in Nevada.

4. Helix is informed and believes and therefore alleges that the City of North Las Vegas ("CNLV"), a non-party to this Case, is a political division of the State of Nevada and is a "contracting party" (as that term is defined by NRS 339.015) for purposes of this litigation.

5. Helix does not know the true names of the individuals, corporations, partnerships and entities sued and identified in fictitious names as DOES I through X, BOE BONDING COMPANIES I through X, (collectively, "Doe Defendants"). Helix alleges that such Defendants claim an interest in or to the Project and/or are responsible for damages suffered by Helix as more fully discussed under the claims for relief set forth below. Helix will request leave of this Honorable Court to amend this Complaint to show the true names and capacities of each such fictitious Defendant when Helix discovers such information.

JURISDICTIONAL ALLEGATIONS

6. Jurisdiction is proper under Nevada Const. Art. 6, §6 and NRS 4.370(1)(a), because this is an action for breach of contract seeking damages in excess of \$10,000.

7. Venue is proper under NRS 13.010(1) and NRS 339.055 because this action is for breach of a contract to be performed in Clark County.

GENERAL ALLEGATIONS

8. Helix repeats and realleges each and every allegation contained in the preceding paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

9. APCO was the prime contractor for CNLV's construction project commonly referred to as the Craig Ranch Regional Park Phase II project located in Clark County, Nevada (the "Project").

10. Helix entered into an agreement with APCO ("Agreement") wherein Helix agreed to provide certain electrical related labor, materials and equipment (the "Work") to the Project.

11. Pursuant to the provisions of NRS 339.025, Safeco, as surety, and APCO, as principal, executed and delivered to CNLV a Labor and Material Payment Bond, No. 024043470

(the "Bond") by which Safeco and APCO, jointly and severally, bound themselves to make payment to all persons or entities furnishing materials, equipment, suppliers, or labor furnished in connection with the Project, including Helix.

12. The Project was scheduled to be completed on January 9, 2013, but as a result of APCO's failures to properly manage the Project, completion did not occur until July 2, 2014, when the City Council for CNLV voted for approval of the Final Acceptance of the Project, which resulted in substantial additional costs incurred by Helix.

FIRST CAUSE OF ACTION
(Breach of Contract – Against APCO)

13. Helix repeats and realleges each and every allegation contained in the preceding paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

14. In or around December, 2011, Helix entered into the Agreement with APCO wherein Helix agreed to furnish the Work to the Project.

15. Helix furnished the Work as required by the Agreement for the benefit of and at the specific instance and request of APCO.

16. Pursuant to the Agreement, Helix was to be paid an amount in excess of Ten Thousand and no/100 Dollars (\$10,000.00) for its Work pursuant to the Agreement.

17. Helix furnished the Work as required by the Agreement and has otherwise performed its duties and obligations as required.

18. APCO breached the Agreement by, among other things:

- a. Failing and/or refusing to pay the monies owed to Helix for its Work;
- b. Failing to adjust the Agreement price to account for extra and/or changed work, as well as suspensions and delays caused or ordered by APCO and/or its representatives;
- c. Failing to promptly recognize and grant time extensions to reflect additional time allowable under the Agreement and permit related adjustments in scheduled performance;
- d. Failing and/or refusing to comply with the Agreement and Nevada law;

and

e. Negligently or intentionally preventing, obstructing, hindering or interfering with Helix's performance or provision of the Work as required under the Agreement.

19. Helix is owed an amount in excess of Ten Thousand and no/100 Dollars (\$10,000.00) for the Work pursuant to the Agreement, ("Outstanding Balance").

20. Helix has been required to engage the services of an attorney to collect the Outstanding Balance with respect to the Agreement, and Helix is entitled to recover its reasonable costs, attorney's fees and interest therefore.

SECOND CAUSE OF ACTION

(Breach of Implied Covenant of Good Faith & Fair Dealing – Against APCO)

21. Helix repeats and realleges each and every allegation contained in the preceding paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

22. There is a covenant of good faith and fair dealing implied in every agreement, including the Agreement between Helix and APCO.

23. APCO breached its duty to act in good faith by performing the Agreement in a manner that was unfaithful to the purpose of the Agreement, thereby denying Helix's justified expectations.

24. Due to the actions of APCO, Helix has suffered damages in an amount to be determined at trial for which Helix is entitled to judgment plus interest.

25. Helix has been required to engage the services of an attorney to collect the Outstanding Balance, and Helix is entitled to recover its reasonable costs, attorney's fees and interest therefore.

THIRD CAUSE OF ACTION

(Unjust Enrichment or in the Alternative Quantum Meruit-Against APCO)

26. Helix repeats and realleges each and every allegation contained in the preceding paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

27. This cause of action is being pled in the alternative.

28. Helix furnished the Work for the benefit of and/or at the specific instance and request of APCO.

29. APCO accepted, used and enjoyed the benefit of the Work.

30. APCO knew or should have known that Helix expected to be paid for the Work.

31. Helix has demanded payment of the Outstanding Balance.

32. To date, APCO has failed, neglected, and/or refused to pay the Outstanding Balance.

33. APCO has been unjustly enriched, to the detriment of Helix.

34. Helix has been required to engage the services of an attorney to collect the Outstanding Balance, and Helix is entitled to recover its reasonable costs, attorney's fees and interest therefore.

FOURTH CAUSE OF ACTION
(Violation of NRS 338.550 Against APCO)

3. APCO repeats and realleges each and every allegation contained in the preceding paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

4. NRS 338.550 to 338.645, inclusive (the "Statute"), requires contractors, such as APCO, to, among other things, timely pay contractors and suppliers, such as Helix, as provided in the Statute.

5. In violation of the Statute, APCO has failed and/or refused to timely pay Helix monies due and owing.

6. Owing to APCO's violation of the Statute, Helix was damaged in an amount in excess of Ten Thousand Dollars (\$10,000.00).

7. By reason of the foregoing, Helix is entitled to a judgment against APCO in the amount of the Outstanding Balance.

8. Helix has been required to engage the services of an attorney to collect the Outstanding Balance and Helix is entitled to recover its reasonable costs, attorney's fees and interests therefore.

FIFTH CAUSE OF ACTION
(Claim Against Payment Bond – Against Safeco)

35. Helix repeats and realleges each and every allegation contained in the preceding paragraphs of this Complaint, incorporates them herein by reference, and further alleges as follows:

36. Pursuant to NRS 339.025, APCO and Safeco executed the Bond for the benefit of APCO's subcontractors, laborers and suppliers, including Helix.

37. In compliance with the Agreement, Helix has furnished the Work for the benefit of APCO.

38. Helix has not been paid in full for the Work under the Agreement.

39. Pursuant to the express language of the Bond, "it shall remain in effect until two (2) years after the date of final acceptance of the Work by the CNLV City Council."¹

40. The City Council for CNLV approved the Final Acceptance of the Project and Work on July 2, 2014.

41. It has been more than ninety (90) days but less than two (2) years since Helix provided the Work for the Project under the Agreement and the City Council for CNLV gave final acceptance of the Work.

42. As such, Helix has timely filed its claim against the Bond.

43. Pursuant to NRS 339.035 and the language of the Bond, Helix is entitled to payment by Safeco of all sums owed to it by APCO.

44. Accordingly, Helix is entitled to payment by Safeco of all sums owed to it by APCO, which are in excess of \$10,000.00.

45. Helix was required to engage the services of any attorney to collect the Outstanding Balance, and Helix is entitled to recover its reasonable costs, attorney's fees and interest therefor.

WHEREFORE, Helix prays that this Honorable Court:

1. Enters judgment against APCO and Safeco, and each of them, jointly and severally, in the amount of the Outstanding Balance;

2. Enters judgment against APCO and Safeco, and each of them, jointly and severally, for Helix's reasonable costs and attorney's fees incurred in the collection of the Outstanding Balance, as well as an award of interest thereon;

¹ See Exhibit "1" attached hereto, a true and correct copy of the Payment Bond.

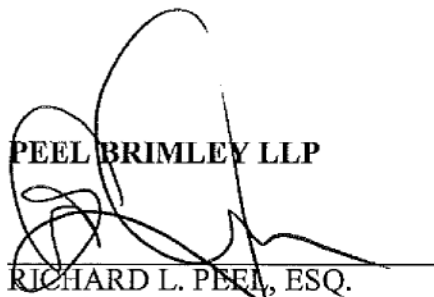
PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

1 3. Enters a judgment declaring that Helix has a valid and enforceable claim against
2 the Bond, in an amount of the Outstanding Balance, plus reasonable attorneys' fees, costs and
3 interest thereon; and

4 3. For such other and further relief as this Honorable Court deems just and proper in
5 the premises

6 DATED this 11 day of January, 2016.

7
8 **PEEL BRIMLEY LLP**

9
10 
11 RICHARD L. PEEL, ESQ.

12 Nevada Bar No. 4359

13 CARY B. DOMINA, ESQ.

14 Nevada Bar No. 10567

15 3333 E. Serene Avenue, Suite 200

16 Henderson, Nevada 89074-6571

17 Attorneys for Helix Electric of Nevada, LLC
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EXHIBIT “1”

CITY OF NORTH LAS VEGAS
LABOR AND MATERIAL PAYMENT BOND

BOND NUMBER 024043470
DATE EXECUTED December 20, 2011

IMPORTANT: SURETY COMPANIES EXECUTING BONDS MUST BE LICENSED TO ISSUE SURETY BY THE STATE OF NEVADA INSURANCE DIVISION PURSUANT TO NRS 683A.090. NOTE: INDIVIDUAL SURETY BONDS ARE NOT ACCEPTABLE.

KNOW ALL MEN BY THESE PRESENTS, That we, the CONTRACTOR AND SURETY, are held and firmly bound unto the City of North Las Vegas, Nevada, hereinafter referred to as the City, in the penal sum of *** for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

*** Twenty Eight Million, Five Hundred Twelve Thousand, Fifty-Four and No/100 Dollars (\$28,512,054.00)
THE CONDITION OF THIS OBLIGATION IS SUCH, That whereas the CONTRACTOR entered into a certain Contract with the City, to perform all Work required under the Bidding Schedule(s), Bid No. 1390, of the City's specifications, entitled CRAIG RANCH REGIONAL PARK - PHASE II.

NOW THEREFORE, If said CONTRACTOR, fails to pay for any materials, equipment, or other supplies, or for rental of same, used in connection with the performance of Work contracted to be done, or for amounts due under applicable State Law for any work or labor thereon, said Surety will pay for the same in an amount not exceeding the sum specified above and in the event suit is brought upon this bond, a reasonable attorney's fee to be fixed by the court. This bond shall insure to the benefit of any persons, companies or corporations entitled to file claims under applicable State Law. This bond shall remain in effect until two (2) years after the date of final acceptance of the Work by the City Council.

PROVIDED, that any modifications in the Work to be done or the materials to be furnished, which may be made pursuant to the terms of said Contract, shall not in any way release either said Contractor or said Surety thereunder, nor shall any extensions of time granted under the provisions of said Contract release either said Contractor or said Surety, and notice of such modifications or extensions of the Contract is hereby waived by said Surety.

SIGNED this 20th day of December, 2011.

(SEAL AND NOTARIAL ACKNOWLEDGMENT OF SURETY)

APCO Construction
(Principal Contractor)

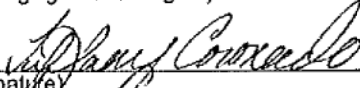
Jay N. Smith, Secretary
(Authorized Representative and Title)

By: _____
(Signature)

Surety: Safeco Insurance Company of America

65561
(State of Nevada, License Number)

Tiffany Coronado / License No: 735000
(Managing General Agent)

By: 
(Signature)

HUB International Insurance Services
Address: 8925 W. Russell Road, Suite 220, Las Vegas, NV 89148

Telephone: (702)365-9800

ISSUING COMPANY MUST HOLD CERTIFICATES OF AUTHORITY AS ACCEPTABLE SURETY ON FEDERAL BONDS AND AS ACCEPTABLE REINSURING COMPANY WITH LISTING IN THE DEPARTMENT OF TREASURY, FISCAL SERVICE, (DEPARTMENT CIRCULAR 570, CURRENT REVISION) AND AS LISTED WITH A. M. BEST COMPANY WITH A RATING OF A OR BETTER.

THIS POWER OF ATTORNEY IS NOT VALID UNLESS IT IS PRINTED ON RED BACKGROUND.

4735374

This Power of Attorney limits the acts of those named herein, and they have no authority to bind the Company except in the manner and to the extent herein stated.

SAFECO INSURANCE COMPANY OF AMERICA
SEATTLE, WASHINGTON
POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS: That Safeco Insurance Company of America (the "Company"), a Washington stock insurance company, pursuant to and by authority of the By-law and Authorization hereinafter set forth, does hereby name, constitute and appoint GREGORY K. PIKE, BERNHARD TRUJILLO, LAURA BRICHETTO, TIFFANY CORONADO, ALL OF THE CITY OF LAS VEGAS, STATE OF NEVADA

, each individually if there be more than one named, its true and lawful attorney-in-fact to make, execute, seal, acknowledge and deliver, for and on its behalf as surety and as its act and deed, any and all undertakings, bonds, recognizances and other surety obligations in the penal sum not exceeding TWO HUNDRED FIFTY MILLION AND 00/100 DOLLARS (\$ 250,000,000.00) each, and the execution of such undertakings, bonds, recognizances and other surety obligations, in pursuance of these presents, shall be as binding upon the Company as if they had been duly signed by the president and attested by the secretary of the Company in their own proper persons.

That this power is made and executed pursuant to and by authority of the following By-law and Authorization:

ARTICLE IV - Officers: Section 12. Power of Attorney.

Any officer or other official of the Corporation authorized for that purpose in writing by the Chairman or the President, and subject to such limitations as the Chairman or the President may prescribe, shall appoint such attorneys-in-fact, as may be necessary to act in behalf of the Corporation to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations. Such attorneys-in-fact, subject to the limitations set forth in their respective powers of attorney, shall have full power to bind the Corporation by their signature and executed, such instruments shall be as binding as if signed by the president and attested by the secretary.

By the following Instrument the chairman or the president has authorized the officer or other official named therein to appoint attorneys-in-fact:

Pursuant to Article IV, Section 12 of the By-laws, David M. Carey, Assistant Secretary of Safeco Insurance Company of America, is authorized to appoint such attorneys-in-fact as may be necessary to act in behalf of the Corporation to make, execute, seal, acknowledge and deliver as surety any and all undertakings, bonds, recognizances and other surety obligations.

That the By-law and the Authorization set forth above are true copies thereof and are now in full force and effect.

IN WITNESS WHEREOF, this Power of Attorney has been subscribed by an authorized officer or official of the Company and the corporate seal of Safeco Insurance Company of America has been affixed thereto in Plymouth Meeting, Pennsylvania this 27th day of July 2011.



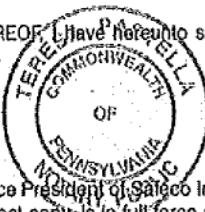
SAFECO INSURANCE COMPANY OF AMERICA

By David M. Carey
David M. Carey, Assistant Secretary

COMMONWEALTH OF PENNSYLVANIA ss
COUNTY OF MONTGOMERY

On this 27th day of July, 2011, before me, a Notary Public, personally came David M. Carey, to me known, and acknowledged that he is an Assistant Secretary of Safeco Insurance Company of America; that he knows the seal of said corporation; and that he executed the above Power of Attorney and affixed the corporate seal of Safeco Insurance Company of America thereto with the authority and at the direction of said corporation.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my notarial seal at Plymouth Meeting, Pennsylvania, on the day and year first above written.



Notarial Seal
Teresa Pastella, Notary Public
Plymouth Twp., Montgomery County
My Commission Expires Mar. 28, 2013
Montgomery, Pennsylvania Association of Notaries

By Teresa Pastella
Teresa Pastella, Notary Public

CERTIFICATE

I, the undersigned, Vice President of Safeco Insurance Company of America, do hereby certify that the original power of attorney of which the foregoing is a full, true and correct copy is in full force and effect on the date of this certificate; and I do further certify that the officer or official who executed the said power of attorney is an Officer specially authorized by the chairman or the president to appoint attorneys-in-fact as provided in Article IV, Section 12 of the By-laws of Safeco Insurance Company of America.

This certificate and the above power of attorney may be signed by facsimile or mechanically reproduced signatures under and by authority of the following vote of the board of directors of Safeco Insurance Company of America at a meeting duly called and held on the 18th day of September, 2009.

VOTED that the facsimile or mechanically reproduced signature of any assistant secretary of the company, wherever appearing upon a certified copy of any power of attorney issued by the company in connection with surety bonds, shall be valid and binding upon the company with the same force and effect as though manually affixed.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the corporate seal of the said company, this 20th day of December, 2011.



By Gregory W. Davenport
Gregory W. Davenport, Vice President

Not valid for mortgage, note, loan, letter of credit, bank deposit, currency rate, interest rate or residual value guarantees.

To confirm the validity of this Power of Attorney call 1-610-832-8240 between 9:00 am and 4:30 pm EST on any business day.

RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
CARY B. DOMINA, ESQ.
Nevada Bar No. 10567
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Attorneys for Plaintiff Helix Electric of Nevada, LLC

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

HELIX ELECTRIC OF NEVADA, LLC, a
Nevada limited liability company,

Plaintiff,

vs.

APCO CONSTRUCTION, a Nevada
corporation; SAFECO INSURANCE
COMPANY OF AMERICA; DOES I through X;
and BOE BONDING COMPANIES I through X,

Defendants.

CASE NO.:
DEPT. NO.:

**INITIAL APPEARANCE FEE
DISCLOSURE**

(NRS CHAPTER 19)

Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for
parties appearing in the above-entitled action as indicated below:

Name of Plaintiff – Helix Electric of Nevada, LLC	<input checked="" type="checkbox"/> <u>\$270.00</u>	<input type="checkbox"/> \$223.00
TOTAL REMITTED:	\$270.00	

DATED this 12th day of January, 2016.

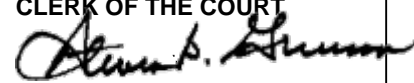
PEEL BRIMLEY LLP

/s/Cary B. Domina

RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
CARY B. DOMINA, ESQ.
Nevada Bar No. 10567
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Attorneys for Helix Electric of Nevada, LLC

Exhibit 2

Exhibit 2



1 FFCL

2
3 DISTRICT COURT

4 CLARK COUNTY, NEVADA

5 HELIX ELECTRIC OF NEVADA, LLC, a
6 Nevada limited liability company,

7 Plaintiff,

8 v.

9 APCO CONSTRUCTION, a Nevada
10 corporation; SAFECO INSURANCE
11 COMPANY OF AMERICA; DOES I through
12 X; and BOE BONDING COMPANIES, I
through X,

13 Defendants.

Case No.: A-16-730091-C

Dept.: XI

14
15 ***FINDINGS OF FACT AND CONCLUSIONS OF LAW***

16 This matter having come on for non-jury trial before the Honorable Elizabeth Gonzalez
17 beginning on June 3, 2019, and continuing day to day, until its completion on June 5, 2019;
18 Plaintiff, HELIX ELECTRIC OF NEVADA, LLC ("Helix"), was represented by and through its
19 counsel, Cary B. Domina, Esq. and Ronald J. Cox, Esq. of the law firm of Peel Brimley LLP, and
20 Defendants, APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF
21 AMERICA ("Safeco"), were represented by and through their counsel, Randy Jefferies, Esq. of
22 Fennemore Craig; the Court having read and considered the pleadings filed by the parties; having
23 reviewed the evidence admitted during the trial; having heard and carefully considered the
24 testimony of the witnesses called to testify; having considered the oral and written arguments of
25 counsel, and with the intent of rendering a decision on all remaining claims before the Court,

RECEIVED

JUL 08 2019

CLERK OF THE COURT

1 pursuant to NRCP 52(a) and 58;¹ the Court makes the following findings of fact and conclusions
2 of law:

3
4 FINDINGS OF FACT

5 1. In July 2011, APCO submitted a bid for the Craig Ranch Regional Park – Phase II
6 - Project No. 10294 (“Project”) to the City of North Las Vegas (“CNLV”). At that time, the
7 anticipated Project duration was approximately 550 calendar days.

8 2. Helix submitted a bid of approximately \$4,600,000 to APCO for the electrical
9 work required on the Project. Helix’s estimate assumed a Project duration of 550 days.

10 3. CNLV canceled the original solicitation and ultimately requested a second round
11 of bids in October 2011. Among other things, CNLV changed the duration of the Project from 18
12 months to 12 months.

13 4. On or about October 26, 2011, APCO submitted its second bid to CNLV for the
14 Project with a 12-month schedule.

15 5. CNLV issued its notice to proceed to APCO on January 11, 2012. APCO started
16 work on the Project on approximately January 16, 2012.

17 6. Helix mobilized its equipment and started work full time on or about February 20,
18 2012.

19 7. In the spring of 2012, APCO entered into a construction agreement (the “Prime
20 Contract”) with the CNLV in which APCO agreed to serve as the general contractor on the
21 Project.

22 8. Section 6.3.2 the General Conditions of the Prime Contract which are incorporated
23 into the Subcontract, states in part:

24
25
26
27 ¹ In the pretrial statement, the parties have stipulated that the Contract time was extended from January 2013
28 into November 2013 through no fault of either APCO or Helix.

1 [a]ll other claims notices for extra work shall be filed in writing to the Construction
2 Manager prior to the commencement of such work. Written notices shall use the words
3 "Notice of Potential Claim." Such Notice of Potential Claim shall state the circumstances
4 and all reasons for the claim, but need not state the amount.

5 9. After receiving the notice of proposed award, APCO agreed to contract terms with
6 Helix subject to certain specially negotiated terms modifying the form subcontract ("Helix
7 Addendum").

8 10. As part of the negotiation, APCO agreed to purchase certain materials totaling
9 \$2,248,248 as specified by Helix, which was to be removed from Helix's original proposed scope
10 and pricing.

11 11. Helix entered into an agreement with APCO to provide certain electrical related
12 labor, materials and equipment (the "Work") to the Project for the lump sum amount of
13 \$2,356,520.

14 12. On or about April 19, 2012, APCO and Helix entered into a formal subcontract for
15 the electrical work required on the Project (the "Subcontract").

16 13. Helix's Daily Reports, Certified Pay Roll Records and the Project Sign-in Sheets
17 establish that Helix started performing work for the Project as early as January 23, 2012, and
18 mobilized on the Project on or about February 28, 2012.

19 14. Pursuant to Exhibit "A" of the Subcontract, Helix was required to supply "all
20 labor, materials, tools, equipment, hoisting, forklift, supervision, management, permits and taxes
21 necessary to complete all of the scope of work" for the 'complete electrical package' for the
22 Project.
23

24 15. Section 6.5 contains a "no damage for delay" provision.

25
26 If Subcontractor shall be delayed in the performance of the Work by any act or neglect of
27 the Owner or Architect, or by agents or representatives of either, or by changes ordered in
28 the Work, or by fire, unavoidable casualties, national emergency, or by any cause other
that [SIC] the intentional Interference of Contractor, Subcontractor shall be entitled, as
Subcontractor's exclusive remedy, to an extension of time reasonably necessary to

1 compensate for the time lost due to the delay, but only if Subcontractor shall notify
2 Contractor in writing within twenty four (24) hours after such occurrences, and only if
3 Contractor shall be granted such time extension by Owner.

4 This clause was not modified by the Helix Addendum.

5 16. Section 6.7 of the Subcontract provided in pertinent part:

6 Contractor shall not be liable to Subcontractor for delays caused by reason of fire or other
7 casualty, or on account of riots, strikes, labor trouble, terrorism, acts of God, cataclysmic
8 event, or by reason of any other event or cause beyond Contractor's control, or
9 contributed to by Subcontractor.

10 Section 6.7 was not modified by the Helix Addendum.

11 17. The Parties Contract requires proof of actual cost increase. Section 7.1—which
12 was unchanged by the Helix Addendum—provides:

13 Contractor may order or direct changes, additions, deletions or other revisions in the
14 Subcontract work without invalidating the Subcontract. No changes, additions, deletions,
15 or other revisions to the Subcontract shall be valid unless made in writing. Subcontractor
16 markup shall be limited to that stated in the contract documents in addition to the
17 direct/actual on-site cost of the work, however, no profit and overhead markup on
18 overtime shall be allowed.

19 18. Section 7.2 as modified by the Helix Addendum, provided:

20 Subcontractor, prior to the commencement of such changed or revised work, shall submit,
21 (within 5 days of Contractor's written request) to Contractor, written copies of the
22 breakdown of cost or credit proposal, including work schedule revisions, for changes,
23 additions, deletions, or other revisions in a manner consistent with the Contract
24 Documents. Contractor shall not be liable to Subcontractor for a greater sum, or
25 additional time extensions, than Contractor obtains from Owner for such additional work.

26 19. The parties negotiated additional language that was included in Section 6 by the
27 Helix Addendum:

28 In the event the schedule as set forth above is changed by Contractor for whatever reason
so that Subcontractor either is precluded from performing the work in accordance with
said schedule and thereby suffers delay, or, is not allowed the number of calendar days to
perform the work under such modified schedule and must accelerate its performance, then
Subcontractor shall be entitled to receive from Contractor payment representing the costs
and damages sustained by Subcontractor for such delay or acceleration, providing said
costs and damages are first paid to Contractor.

20. Section 4.4 of the Subcontract—as amended by the Helix Addendum provides:

1 Progress payments will be made by Contractor to Subcontractor within 10 calendar days
2 after Contractor actually receives payment for Subcontractor's work from Owner. The
3 progress payment to Subcontractor shall be one hundred percent (100%) of the value of
4 Subcontract work completed (less 10% retention) during the preceding month as
5 determined by the Owner, less such other amounts as Contractor shall determine as being
6 properly withheld as allowed under this Article or as provided elsewhere in this
7 Subcontract. The estimates of Owner as to the amount of Work completed by
8 Subcontractor shall be binding upon Contractor and Subcontractor and shall conclusively
9 establish the amount of Work performed by Subcontractor. As a condition precedent to
10 receiving partial payments from Contractor for Work performed, Subcontractor shall
11 execute and deliver to Contractor, with its application for payment, a full and complete
12 release (Forms attached) of all claims and causes of action Subcontractor may have
13 against Contractor and Owner through the date of the execution of said release, save and
14 except those claims specifically listed on said release and described in a manner sufficient
15 for Contractor to identify such claim or claims with certainty. Upon the request of
16 Contractor, Subcontractor shall provide an Unconditional Waiver of Release in form
17 required by Contractor for any previous payment made to Subcontractor. Any payments
18 to Subcontractor shall be conditioned upon receipt of the actual payments by Contractor
19 from Owner. Subcontractor herein agrees to assume the same risk that the Owner may
20 become insolvent that Contractor has assumed by entering into the Prime Contract with
21 the Owner per NRS Statutes.

22 21. The Subcontract also incorporated the Prime Contract, which included the claim
23 procedures set forth in the Contract.

24 22. Helix assigned Kurk Williams as its Project Manager. Williams never signed in
25 using APCO's sign in sheets that were maintained at the Project site. By his own admission,
26 Williams' time devoted to the Project was not accurately tracked in Helix's certified payroll
27 reports, only Helix's job cost report.

28 23. Richard Clement was Helix's Project Superintendent. Clement was on site
occasionally and signed in with APCO at the Project twice during 2012.

24 24. Clement did not work on the Project between June 11, 2012 and September 26,
25 2012. Clement only worked two weeks on the Project from September 27, 2012 to October 7,
26 2012. Clement did not work on the Project from October 8, 2012 through January 20, 2013. In
27 all of 2013, which was the extended Project time, Clement only worked 32 hours during the week
28 ending January 27, 2013.

1 25. In late January 2013, Helix assigned Clement to another project and designated
2 Rainer Prietzel, Helix's Foreman to oversee work in the field, as the new Project Superintendent
3 and foreman.

4 26. According to the Labor Commissioner, and OSHA regulations, Helix must always
5 have a project superintendent on site at all times during the Project.
6

7 27. From January 2013 to May 2013, Helix typically had a three to five man crew on
8 the Project.

9 28. In early May 2013, with the exception of a few days, Prietzel was the only Helix
10 employee on the Project, and he split his time as the Project Superintendent and self-performing
11 contract and change order work on the Project.

12 29. Prietzel remained the Project Superintendent until the end of the Project in mid-
13 October 2013.
14

15 30. Helix's original line item for its general conditions, as reflected in its pay
16 application, was \$108,040 on a Subcontract price of \$2,380,085, which represents 4.5%.

17 31. The Project encountered significant delays and was not substantially completed
18 until October 25, 2013, thus resulting in Helix claiming approximately, \$138,000 in additional
19 extended overhead costs.

20 32. The project was never abandoned by CNLV.
21

22 33. Prior to the original project completion date passing, on January 9, 2013, APCO
23 submitted its first request for an extension of time to CNLV. APCO submitted its Time Impact
24 Analysis #1 ("TIA #1") to CNLV where it sought extended general conditions and home office
25 overhead of \$418,059 (\$266,229 for general conditions and \$151,830 for home office overhead).

26 34. Helix first notified APCO in writing that it would be asserting a claim for extended
27 overhead costs on January 28, 2013 and reserved its rights to submit a claim for "all additional
28

1 costs incurred due to scheduled delays for this project” (the “Claim”).

2 35. As of May 9, 2013, CNLV had not made a decision on APCO’s TIA #1.

3 36. On May 9, 2013, APCO submitted a revised Time Impact Analysis (“TIA #2”) to
4 CNLV seeking an additional five (5) months of compensation for general conditions and home
5 office overhead, among other claims, for a total delay claim of nine (9) months.
6

7 37. As part of TIA #2, APCO submitted Change Order Request No. 39.1 to CNLV
8 seeking compensation of \$752,499 for its extended general conditions and home office overhead
9 (\$479,205 for general conditions and \$273,294 for home office overhead).

10 38. This represented approximately seventy percent (70%) of APCO’s \$1,090,066.50
11 total claim against CNLV for the 9-month delay to the Project.
12

13 39. APCO’s claim did not include any amounts for its subcontractors, and APCO
14 acknowledges that as a company policy, it does not include its subcontractors’ claims with its
15 own claims.

16 40. Through no fault of APCO, Helix did not take delivery of various light poles and
17 related equipment until approximately January 30, 2013.

18 41. On June 19, 2013, APCO and Helix exchanged emails regarding various Project
19 issues, including Helix’s delay rates. APCO confirmed that if Helix submitted a request for
20 compensation that it would be forwarded to CNLV.
21

22 42. On June 19, 2013 Helix provided a supplemental notice of claim but did not
23 provide any back up to support its daily rates or the impacts alleged to be attributed to the delay.
24 At that time, Helix still only had Prietzel working on site.

25 43. On June 21, 2013 Helix and APCO exchanged emails related to the support for
26 Helix’s claimed costs, with APCO noting that a project manager was considered home office
27 overhead. Helix indicated that its job cost reports would reflect the actual costs for the extended
28

1 overhead.

2 44. In June 2013, Helix realized the Project was still several months away from being
3 completed. According to Helix's June 19 letter entitled "Extended overhead cost", Helix's cost
4 for extended overheard was \$640/day.

5 45. The \$640/day cost is comprised of (1) \$260 for the Project Manager; (2) \$280 for
6 the Superintendent; (3) \$25 for the site trailer; (4) \$5 for the Connex box; (5) \$25 for the forklift;
7 and (6) \$45 for the truck.

8 46. The email that accompanied Helix's June 19, 2013 letter advised APCO that to
9 date, Helix's Claim totaled \$72,960, but that Helix's Claim would increase for each day the
10 Project continued past the original completion date.

11 47. Also on June 19, 2013, APCO informed Helix, by way of an email, that it "is in
12 the process of presenting CNLV with a Time Impact Analysis containing facts as to why the
13 additional costs should be paid." APCO had submitted TIA #2 to CNLV on May 9, 2013, six
14 weeks prior to this email.

15 48. In the email, APCO further advised Helix that "[o]nce we fight the battle, and
16 hopefully come out successfully, this will open the door for Helix...to present their case for the
17 same."

18 49. While APCO notified Helix that it would forward to CNLV any letter Helix
19 provided regarding its claim for extended overhead costs, APCO did not inform Helix that it
20 needed Helix's Claim immediately so it could include it with APCO's claim to CNLV. Indeed,
21 according to APCO, it would first "fight that battle, and hopefully come out successfully..."
22 which would only then "open the door for Helix...to present their case..."

23 50. On August 27, 2013, despite the fact that the Project was still ongoing, Helix
24 furnished APCO with its first invoice for its Claim in the amount of \$102,400, which constituted
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1 32 weeks of extended overhead costs incurred between January 13, 2013, and August 30, 2013
2 (or 160 business days).

3 51. Helix's invoice identified an extended overhead cost of \$640/day for 32 weeks,
4 which had been provided to APCO in June 2013.

5 52. From May 6, 2013 through November 6, 2013, Prietzel was the only Helix person
6 on site. Prietzel confirmed that during that time period he was either working on completing
7 original Subcontract work for which Helix would be paid or change order work that was
8 acknowledged and paid by APCO and CNLV.

9 53. During construction, CNLV made changes or otherwise caused issues that
10 impacted Helix. In those instances, Helix submitted a request for additional compensation and
11 CNLV issued APCO change orders that compensated Helix for the related impacts. During the
12 extended Contract time, CNLV issued eleven change orders that resulted in additional
13 compensation to Helix through the Subcontract. Helix's pricing for the change orders included a
14 10% markup on materials and a 15% markup on labor to cover Helix's overhead.

15 54. APCO submitted Change Order Request No. 68 ("COR 68") to CNLV on
16 September 9, 2013, requesting compensation for Helix's Claim.

17 55. On September 16, 2013, CNLV rejected the COR 68 stating, "This COR is
18 REJECTED. The City of North Las Vegas does not have a contract with Helix Electric."

19 56. CNLV stated that it did not reject COR 68 for lack of backup or untimeliness.

20 57. The Construction Manager for CNLV during the Project, Joemel Llamado,
21 testified that the only reason he rejected Helix's Claim was because CNLV did not have a
22 contract with Helix. APCO should have included Helix's Claim in its own claim to CNLV since
23 Helix's Subcontract was with APCO, not CNLV.

24 58. Llamado did not look at the merits of the Claim because the Claim should have
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28

1 been included with APCO's claim.

2 59. APCO informed Helix that CNLV rejected COR 68 because of lack of backup
3 documentation.

4 60. On October 2, 2013, CNLV issued its decision on APCO's request for additional
5 time and compensation. CNLV determined that the time period from January 11, 2013 to May
6 10, 2013 was an excusable but not compensable delay. APCO was not charged liquidated
7 damages, but also was not provided compensation from January thru May 10, 2013. CNLV did
8 confirm that it would pay APCO \$560,724.16 for the delay from May 10, 2013 to October 25,
9 2013. APCO accepted that determination on or about October 10, 2013.

10 61. On October 3, 2013, APCO sent Helix a letter requesting additional back-up
11 documentation for the Claim so it could resubmit the Claim to CNLV.

12 62. That letter states in relevant part:

13
14 Attached is your invoice of August 27, 2013 in the amount of \$102,400. At this time
15 APCO has not received any back-up documentation to undo the previous formal rejection
16 made by the City of North Las Vegas. If you want APCO to re-submit your request,
17 please provide appropriate back-up for review.

18 63. On October 2, 2013, CNLV and APCO entered into a settlement agreement
19 through which CNLV agreed to pay APCO \$560,724.16 for its claim submitted under TIA #2,
20 including APCO's claim for added overhead and general conditions it incurred as a result of the
21 nine-month delay to the Project.

22 64. According to that settlement agreement, APCO agreed to "forgo any claims for
23 delays, disruptions, general conditions and overtime costs associated with the weekend work
24 previously performed...and for any other claim, present or future, that may occur on the project.

25 65. APCO did not notify Helix that it had entered into this settlement agreement.

26 66. Llamado's position was that the settlement agreement resolved any and all claims
27 between CNLV and APCO for the nine-month delay to the Project, including any claims APCO's
28

1 subcontractors might have.²

2 67. Pursuant to this settlement agreement, CNLV issued Change Order No. 50 to
3 APCO and agreed to pay APCO \$560,724.16 for the added overhead and general conditions it
4 incurred as a result of the extended project completion date.

5 68. On October 3, 2013, APCO transmitted to Helix CNLV's rejection of its invoice
6 for extended overhead.

7 69. Near the end of the Project in October 2013, Pelan, notified Helix, that Helix could
8 not include the Claim for extended overhead in Helix's pay application for retention because
9 CNLV would not release the retention on the Project if there were outstanding Claims on the
10 Project.

11 70. In compliance with Pelan's instructions, on October 18, 2013, Helix submitted its
12 Pay Application for Retention only in the amount of \$105,677.01 and identified it as Pay
13 Application No. 161113-002 (the "Retention Pay App").

14 71. On October 18, 2013, Helix submitted its pay application for the time period up
15 through October 30, 2013. At that time, Helix billed its general conditions line item at 100%.

16 72. On October 18, 2013, Helix submitted its pay application for the release of
17 retention. As with prior pay applications, Helix enclosed a conditional waiver. The release was
18 conditioned on APCO issuing a final payment in the amount of \$105,677.01 and expressly
19 confirmed that there were "zero" claims outstanding. Helix signed and provided that release to
20 APCO after receiving CNLV's rejection of its extended overhead invoice.

21 73. Helix also provided to APCO a "Conditional Waiver and Release Upon Final
22 Payment" (the "Conditional Waiver") for the Retention Pay App only (i.e. Pay App No. 161113-
23

24
25
26
27 ² Joe Pelan, the Contract Manager for APCO, disagreed with this position, but APCO and Helix did not test it
28 through the claims process provided in the Prime Contract.

1 002).

2 74. Helix indicated in the Conditional Waiver that there was no "Disputed Claim
3 Amount" relating to the Retention Pay App.

4 75. Helix takes the position that the Conditional Waiver was not intended to release
5 Helix's Claim.

6 76. The evidence presented at trial of the circumstances surrounding the execution of
7 the Conditional Waiver do not support Helix's waiver of the Claim.

8 77. It took APCO more than a year to pay Helix for its Retention Pay App, during
9 which time, Helix made it clear to APCO that it would continue pursuing its Claim.

10 78. Between October 2013 and the end of October 2014 when APCO finally paid
11 Helix its retention, APCO forwarded Helix's Claim to CNLV on two separate occasions and
12 received multiple written notices from Helix that it maintained its Claim against APCO.

13 79. The project was substantially completed on October 25, 2013.

14 80. On October 31, 2013, in order to account for certain overhead items that were
15 omitted from the original Claim, Helix: (i) increased its Claim from \$102,400 to \$111,847; (ii)
16 resubmitted its Invoice to APCO; and (iii) provided additional backup information and
17 documents. Included with the revised invoice was a monthly breakdown of Helix's Claim from
18 January to August, which included the following categories of damages: (1) Project Manager; (2)
19 Project Engineer; (3) Superintendent; (4) Site trucks; (5) Project Fuel; (6) Site Trailer; (7) Wire
20 Trailer; (8) Office supplies; (9) Storage Connex boxes; (10) forklifts; (11) small tools; and (12)
21 consumables. According to the summary of the Claim, Helix charged the Project 4-hours a day
22 for its Project Manager, Kurk Williams at \$65/hour, and 4-hours a day for its Superintendent, Ray
23 Prietzel at \$70/day.

24 81. On or about November 5, 2013, three weeks after APCO received Helix's
25
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28

1 Retention Pay App and Conditional Waiver, APCO submitted a revised COR 68 (68.1) to CNLV
2 seeking a total of \$111,847 for Helix's Claim.

3 82. Had APCO believed Helix's Conditional Waiver for the Retention Pay App
4 (received on October 18, 2013) waived any and all claims Helix had on the Project, including its
5 Claim for extended overhead, APCO would not have submitted revised COR 68.1 to CNLV three
6 weeks after receiving Helix's Conditional Waiver.
7

8 83. On November 18, 2013, CNLV again rejected the Change Order Request stating,
9 "This is the 2nd COR for Helix Electric's extended overhead submittal. The 1st one was submitted
10 on Sept. 9, 2013 and Rejected on Sept. 16, 2013. This submittal dated Nov. 5, 2013 is
11 REJECTED on Nov. 13, 2013."

12 84. Llamado's second rejection had nothing to do with lack of backup documents or
13 untimeliness and was rejected simply because APCO should have included Helix's Claim under
14 its own claim to CNLV.
15

16 85. By this time, APCO had already settled with CNLV to receive payment for its own
17 extended overhead costs, and in doing so, waived and released any further claims against CNLV,
18 including Helix's Claim.
19

20 86. As Helix had previously informed APCO it would, on or about November 13,
21 2013, Helix submitted to APCO another invoice including backup in the amount of \$26,304
22 accounting for the extended overhead costs for September and October ("COR 93").

23 87. APCO confirmed to Helix's Kurk Williams that there would be no APCO
24 approval unless and until CNLV approved Helix's request.

25 88. CNLV rejected COR 93.

26 89. By submitting COR 93 to CNLV on November 13, 2013, APCO once again
27 acknowledged that it knew Helix's Conditional Waiver submitted on October 18, 2013 related to
28

1 the Retention Pay App only, and did not waive Helix's Claim for extended overhead.

2 90. If APCO believed the Conditional Waiver released Helix's Claim, APCO would
3 not have continued to submit Helix's Claim to CNLV.

4 91. On January 28, 2014, APCO sent Helix's Victor Fuchs and Bob Johnson an email
5 confirming that he was meeting with CNLV to discuss the remaining change order issues on
6 February 4, 2014. Pelan testified that, CNLV advised APCO that it was rejecting Helix's claim
7 because it had no merit and Helix only had one person on the Project while completing Helix's
8 contract work in 2013. Pelan reported CNLV's position to Helix.³

9 92. The Subcontract incorporated APCO's prime contract with CNLV in Section 1.1,
10 which sets forth CNLV's claims procedure for requests for payment that are escalated to claims.
11 Helix did not request that APCO initiate these proceedings on its behalf regarding the claim for
12 extended overhead.

13 93. On March 31, 2014, CNLV and APCO agreed that there would be no further
14 COR's submitted on the Project.

15 94. On April 16, 2014, Helix's Victor Fuchs threatened to convert the outstanding
16 issues into a claim if Helix's retention was not released per its pay application and release that
17 were submitted on October 18, 2013.

18 95. APCO admitted that on June 10, 2014, it received final retention from CNLV.

19 96. However, because APCO had not paid Helix its Retention or its Claim, Helix sent
20 APCO another demand for payment on September 26, 2014, seeking payment for both its
21 Retention and the Claim.

22 97. CNLV issued the formal notice of completion of the project on July 8, 2014.

23 ³ While the Court finds Pelan's testimony on this issue credible, the testimony of Llamado
24 differs.
25
26
27
28

1 98. On October 21, 2014, APCO issued check number 1473 in the amount of
2 \$105,679, which represented final payment of Helix's retention, in accordance with the October
3 18, 2013 retention billing and related final release.⁴

4 99. On October 29, 2014, APCO sent Helix an email requesting that it sign a new
5 Conditional Waiver and Release Upon Final Payment which included Helix's Retention only, but
6 did not include any disputed amount for the Claim.
7

8 100. Attached to that email was a copy of the Retention Check APCO informed Helix it
9 could pickup once it received the new executed Conditional Release.

10 101. Upon receiving the new Conditional Waiver and before picking up the Retention
11 Check, Helix notified APCO that it was not going to sign the new Conditional Waiver without
12 reserving a right to its Claim.
13

14 102. APCO invited Helix to revise the new Conditional Waiver as it saw fit, and Helix
15 provided an unsigned copy of it seeking full payment of the Claim and the Retention for a total
16 amount of \$243,830.

17 103. APCO declined to pay the Claim, and after additional discussions between Helix
18 and APCO, it was decided that Helix would exchange for the Retention Check an Unconditional
19 Waiver and Release Upon Final Payment seeking payment of \$105,679 for Retention, and
20 reserving as its Disputed Claim, \$138,151.
21

22 104. As part of the "Disputed Claim" field, Helix referenced additional correspondence
23 which it had incorporated into the Unconditional Waiver and Release.

24 105. Helix included a letter dated October 30, 2014 clarifying that while it was
25 demanding its retention payment, it was also seeking payment for its Claim in the amount of
26

27 ⁴ Because of this lengthy delay in payment, Helix is entitled to interest on the retention amount under NRS
28 338.

1 \$138,151 for which it also provided a final invoice.

2 106. In one such email, Helix writes, "Joe, please accept this email as a 30 day
3 extension of time for the execution of [the] promissory note attached...In good faith we [are]
4 extending this time per your request, so you can come up with an arrangement to repay the
5 outstanding amount that is past due."

6
7 107. APCO never executed the Promissory Note or paid Helix its Claim.

8 108. On October 29, 2014, APCO tendered the check and another signed release for
9 final payment. That release mirrored the one that Helix submitted in October 2013.

10 109. On October 29, 2014, Helix's Victor Fuchs sent an email to Pelan stating: "this is
11 not going to work." Pelan responded that same day stating: "Victor, make changes for me to
12 approve. Thanks."

13
14 110. On October 18, 2013, the Senior Vice President of Helix, Robert D. Johnson,
15 signed a "Conditional Waiver and Release Upon Final Payment".

16 111. Helix received the funds on October 29, 2014.

17 112. On October 30, 2014, the day after negotiating the final payment check, Helix
18 tendered a signed final lien release that purported to reserve Helix's extended overhead invoices
19 in the amount of \$138,151.

20
21 113. Helix has established how certain of its costs increased due to the extended time
22 on the Project given its demobilization and reduction in crew size. Prietzel was the only person
23 on site after May 6, 2013 and he was completing base Subcontract work and change order work
24 that was paid by CNLV.

25 114. After weighing the testimony of the witnesses and a review of the admitted
26 documents, the Court finds, that the delay was not so unreasonable to amount to abandonment
27
28

1 and that therefore the provision limiting damages after a delay does not permit the recovery of
2 extended general conditions.

3 115. Since CNLV determined that the delays through May 13, 2013 were not
4 compensable, the only time period that APCO recovered payment for its delay costs was May 13,
5 2013 through October 13, 2013. During that same compensable time period, Helix's reasonable
6 costs totaled \$43,992.39.⁵ Although Helix was earning revenue and being paid during the time
7 period for the Work and certain approved change orders, APCO by its settlement with CNLV,
8 impaired Helix's ability to pursue the Claim.
9

10 116. Helix has supported its claim for certain additional costs. As Prietzel was paid for
11 his time on site under the approved change orders the claimed expense for acting as a
12 superintendent (supervising only himself) is not appropriate.
13

14 117. After weighing the testimony of the witnesses and a review of the admitted
15 documents, the Court finds, Helix has established that it suffered damages as a result of the delay
16 in project completion in the amount of \$43,992.39.

17 118. If any findings of fact are properly conclusions of law, they shall be treated as if
18 appropriately identified and designated.
19

20 CONCLUSIONS OF LAW

- 21 1. The Subcontract was a valid contract between Helix and APCO.

22 ⁵
23 The Court has utilized the summary used as D5 during the trial with the deletion of the line item
"Superintendent". Those totals for the compensable months with that modification are:

24 May 13	\$8501.05
25 June 13	\$7124.90
26 July 13	\$8270.69
27 August 13	\$6785.04
28 September 13	\$6170.56
October 13	\$7140.15
TOTAL	\$43992.39

1 2. The Court finds that the Conditional Waiver Helix submitted to APCO on or about
2 October 2013 did not constitute a waiver of Helix's Claim.

3 3. APCO's own conduct establishes that it knew Helix was not waiving its Claim as
4 it continued to submit Helix's Claim to CNLV after receiving the Conditional Waiver.

5 4. Helix provided sufficient evidence establishing that it incurred damages as a result
6 of the Project schedule extending nine months past its original completion date.

7 5. APCO had a duty to include Helix's Claim in its own claim to CNLV or otherwise
8 preserve the Claim when it settled, which it failed to do.

9 6. APCO's internal policy and decision to keep Helix's Claim separate from its own
10 claim impaired Helix's ability to pursue the Claim.

11 7. When APCO entered into the settlement agreement with CNLV on October 3,
12 2013 without Helix's knowledge, CNLV took the position that APCO waived and released any
13 and all claims arising from the nine month Project delay, including Helix's Claim.

14 8. In every contract, there is an implied covenant of good faith and fair dealing.

15 9. APCO's impairment of Helix's Claim constitutes a breach of the covenant of good
16 faith and fair dealing implied in the Subcontract.

17 10. APCO breached the covenant of good faith and fair dealing when it, without
18 notifying Helix, settled its claim with CNLV for extended general conditions, impairing Helix
19 from pursuing any pass-through claims to CNLV for its Claim, but continued to submit Helix's
20 Claim to CNLV knowing that CNLV rejected it because it had no contractual privity with Helix,
21 and now APCO had released any and all claims against CNLV.

22 11. Helix is entitled to judgment against APCO under its claim for Breach of Implied
23 Covenant of Good Faith and Fair Dealing and its damages are the damages it has established for
24

1 in the amount of \$43,992.39.⁶

2 12. Because the Project was a public works project, it was governed under NRS
3 Chapter 338.

4 13. Under NRS 338.490, a conditional waiver and release can only release payments
5 for work which is the subject of the payment application to which the wavier and release
6 corresponds.
7

8 14. The Conditional Waiver Helix provided APCO on October 18, 2013, was for
9 retention only and expressly referred to the Retention Pay App (Pay Application No. 161113-022)
10 which sought retention only.

11 15. The Retention Pay App did not include Helix's Claim.

12 16. Therefore, because by statute, the Conditional Waiver can only release work that is
13 the subject of the Retention Pay App, it did not constitute a waiver and release of Helix's Claim.
14

15 17. NRS 338.565 states in relevant part:

16 If a contractor makes payment to a subcontractor or supplier more
17 than 10 days after the occurrence of any of the following acts or
18 omissions: (a) the contractor fails to pay his or her subcontractor or
19 supplier in accordance with the provisions of subsection 1 of NRS
20 338.550...the contractor shall pay to the subcontractor or supplier,
21 in addition to the entire amount of the progress bill or the retainage
22 bill or any portion thereof, interest from the 10th day on the amount
23 delayed, at a rate equal to the lowest daily prime rate...plus 2
24 percent, until payment is made to the subcontractor or supplier.

25 18. NRS 338.550(1) required APCO to pay Helix its retention within 10 days of
26 receiving its retention payment from CNLV.
27

28 ⁶ The Court has not awarded separate damages for the breach of contract claim as those would be duplicative of this award.

1 19. APCO admits it received its retention payment from CNLV on June 10, 2014, yet
2 it did not pay Helix its retention until October 30, 2014, more than four months later and in
3 violation of NRS 338.550(1).

4 20. APCO was required to pay Helix its retention amount of \$105,677.01, in addition
5 to interest at the rate of prime plus 2 percent from June 10, 2014 through October 30, 2014.
6 APCO failed to do so.

7 21. After providing APCO with the Conditional Waiver, Helix incurred additional
8 damages that could not be waived by way of the Conditional Waiver (i.e. the interest on its
9 wrongfully withheld retention).

10 22. On June 10, 2014, APCO received final retention from CNLV.

11 23. APCO failed to pay Helix its retention in the amount of \$105,679 until October 29,
12 2014.

13 24. Pursuant to NRS 338.550(1), APCO was required to pay Helix its retention no
14 later than June 21, 2014.

15 25. As a result of APCO's failure, and pursuant to NRS 338.565(1), APCO is required
16 to pay Helix interest on \$105,677.01 from June 22, 2014 through October 28, 2014, at a rate of
17 5.25% for a total of \$1,960.85.

18 26. Even if the pay-if-paid clause was enforceable, APCO cannot rely upon it to shield
19 itself from liability to Helix when its decision to submit Helix's Claim separately from its claim
20 led to CNLV rejecting Helix's Claim, and APCO's settlement with CNLV forever barred APCO
21 from receiving payment from CNLV for Helix's Claim.

22 27. To the extent the delays were caused by CNLV, APCO is still liable to Helix since
23 it impaired those claims in contradiction to NRS 624.628(3)(c) by entering into a settlement
24 agreement with CNLV on October 2, 2013.

1 28. Because this Court has found APCO breached the Subcontract and breached the
2 covenant of good faith and fair dealing, Helix is entitled to judgment against Safeco and the
3 Payment Bond as well.

4 29. NRS 339.025(1)(b) provides the following:

5
6 1. Before any contract,..., exceeding \$100,000 for any project
7 for the new construction, repair or reconstruction of any public
8 building or other public work or public improvement of any
9 contracting body is awarded to any contractor, the contractor shall
furnish to the contracting body the following bonds which become
binding upon the award of the contract to the contractor;

10 a.

11 b. A payment bond in an amount to be fixed by the
12 contracting body, but not less than 50 percent of the contract
13 amount, conditioned upon the faithful performance of the
14 contract in accordance with the plans, specifications and
15 conditions of the contract. The bond must be solely for the
protection of claimants supplying labor or materials to the
contractor to whom the contract was awarded, or to any of his
or her subcontractors, in the prosecution of the work provided
for in such contract.

16 30. NRS 339.035(1) provides:

17 ...any claimant who has performed labor or furnished material in
18 the prosecution of the work provided for in any contract for which
19 a payment bond has been given pursuant to the provisions of
20 subsection 1 of NRS 339.025, and who has not been paid in full
21 before the expiration of 90 days after the date on which the
22 claimant performed the last of such labor or furnished the last of
23 such materials for which the claimant claims payment, may bring
an action on such payment bond in his or her own name to recover
any amount due the claimant for such labor or material, and may
prosecute such action to final judgment and have execution on the
judgment.

24 31. SAFECO issued a Labor and Material Payment Bond, Bond No. 024043470,
25 wherein APCO is the principal and SAFECO is the surety.

26 32. Helix provided Work to the Project and remains unpaid for the same.

27 33. Therefore, Helix is a claimant against the Bond and may execute a judgment
28

1 against the same.

2 34. Section 20.5 of the Subcontract provides that “ [i]n the event either party employs
3 an attorney to institute a lawsuit or to demand arbitration for any cause arising out of the
4 Subcontract Work or the Subcontract, or any of the Contract Documents, the prevailing party
5 shall be entitled to all costs, attorney’s fees and any other reasonable expenses incurred therein.”
6

7 35. This provision was not modified by the Helix Addendum.

8 36. The Court finds that Helix is the prevailing party and is entitled to an award of its
9 attorneys’ fees and costs.

10 37. If any conclusions of law are properly findings of fact, they shall be treated as if
11 appropriately identified and designated.

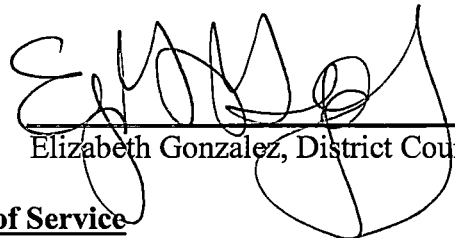
12 Based upon the foregoing Findings of Fact and Conclusions of Law **IT IS HEREBY**
13 **ORDERED, ADJUDGED AND DECREED** as follows:
14

- 15 1. **IT IS HEREBY ORDERED** that, as to Plaintiff’s Claim for Breach of Contract
16 against APCO, this Court finds in favor of Plaintiff but as the Claim was impaired
17 awards damages under the Breach of the Implied Covenant of Good Faith and
18 Fair Dealing, rather than awarding duplicative damages;
- 19 2. **IT IS FURTHER ORDERED** that, as to Plaintiff’s Claim for Breach of the
20 Implied Covenant of Good Faith and Fair Dealing against APCO, this Court finds
21 in favor of Plaintiff and awards damages in the amount of \$43,992.39 together
22 with interest as provided by law and taxable costs of suit;
- 23 3. **IT IS FURTHER ORDERED** that, as to Plaintiff’s Claim for violations of NRS
24 338 against APCO, this Court finds in favor of Plaintiff in the amount of
25 \$1,960.85;⁷
26

27
28 ⁷ These damages are in addition to those awarded under the claim of Breach of the Implied Covenant of Good

- 1 4. **IT IS FURTHER ORDERED** that, given the Court's findings against APCO,
2 the Court finds in favor of Plaintiff and against Safeco and the Bond;
3 5. **IT IS FURTHER ORDERED** that this Court will address any issues of
4 attorneys' fees through motions that may be filed with the Court.
5 6. Any claim not otherwise disposed of by this decision is dismissed.
6

7 DATED this 8th day of July, 2019.
8

9 
10 Elizabeth Gonzalez, District Court Judge
11

12 **Certificate of Service**

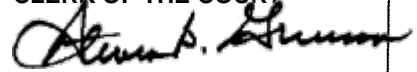
13 I hereby certify that on the date filed, a copy of the foregoing Scheduling Order and
14 Order Setting Civil Jury Trial, Pre-Trial and Calendar Call was electronically served, pursuant to
15 N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing
16 Program.
17

18 
19 Dan Kutinac
20
21
22
23
24
25
26
27
28

Faith and Fair Dealing.

Exhibit 3

Exhibit 3



1 **NEOJ**
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3 Nevada Bar No. 10567
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16 *Attorneys for Plaintiff*
17 *HELIX ELECTRIC OF NEVADA, LLC*

18 **DISTRICT COURT**
19 **CLARK COUNTY, NEVADA**

20 HELIX ELECTRIC OF NEVADA, LLC, a
21 Nevada limited liability company,

22 Plaintiff,

23 vs.

24 APCO CONSTRUCTION, a Nevada corporation;
25 SAFECO INSURANCE COMPANY OF
26 AMERICA; DOES I through X; and BOE
27 BONDING COMPANIES I through X,

28 Defendants.

CASE NO. : A-16-730091-C
DEPT. NO. : XI

**NOTICE OF ENTRY OF FINDINGS
OF FACT AND CONCLUSIONS OF
LAW AND ORDER**

///

///

///

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HENDERSON, NEVADA 89074
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**NOTICE OF ENTRY OF FINDINGS
OF FACT AND CONCLUSIONS OF LAW AND ORDER**

PLEASE TAKE NOTICE that the **FINDINGS OF FACT AND CONCLUSIONS OF
LAW AND ORDER** was filed on **July 8, 2019**, a copy of which is attached as Exhibit 1.

Dated this 10th day of July, 2019.

PEEL BRIMLEY LLP



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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 10th day of July, 2019, I caused the above and foregoing document, **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER**, to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☒ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____

to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

Attorneys for APCO Construction and Safeco Insurance Co.

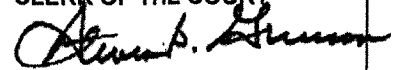
John Randall Jefferies, Esq. (rjefferies@fclaw.com)

Brandi M. Planet, Esq. (bplanet@fclaw.com)



An employee of **PEEL BRIMLEY, LLP**

EXHIBIT 1



1 FFCL

2
3 DISTRICT COURT

4 CLARK COUNTY, NEVADA

5 HELIX ELECTRIC OF NEVADA, LLC, a
6 Nevada limited liability company,

7 Plaintiff,

8 v.

9
10 APCO CONSTRUCTION, a Nevada
11 corporation; SAFECO INSURANCE
12 COMPANY OF AMERICA; DOES I through
13 X; and BOE BONDING COMPANIES, I
14 through X,

15 Defendants.

Case No.: A-16-730091-C

Dept.: XI

16 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

17 This matter having come on for non-jury trial before the Honorable Elizabeth Gonzalez
18 beginning on June 3, 2019, and continuing day to day, until its completion on June 5, 2019;
19 Plaintiff, HELIX ELECTRIC OF NEVADA, LLC ("Helix"), was represented by and through its
20 counsel, Cary B. Domina, Esq. and Ronald J. Cox, Esq. of the law firm of Peel Brimley LLP, and
21 Defendants, APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF
22 AMERICA ("Safeco"), were represented by and through their counsel, Randy Jefferies, Esq. of
23 Fennemore Craig; the Court having read and considered the pleadings filed by the parties; having
24 reviewed the evidence admitted during the trial; having heard and carefully considered the
25 testimony of the witnesses called to testify; having considered the oral and written arguments of
26 counsel, and with the intent of rendering a decision on all remaining claims before the Court,

RECEIVED
JUL 08 2019

CLERK OF THE COURT

1 pursuant to NRCP 52(a) and 58;¹ the Court makes the following findings of fact and conclusions
2 of law:

3
4 FINDINGS OF FACT

5 1. In July 2011, APCO submitted a bid for the Craig Ranch Regional Park – Phase II
6 - Project No. 10294 (“Project”) to the City of North Las Vegas (“CNLV”). At that time, the
7 anticipated Project duration was approximately 550 calendar days.

8 2. Helix submitted a bid of approximately \$4,600,000 to APCO for the electrical
9 work required on the Project. Helix’s estimate assumed a Project duration of 550 days.

10 3. CNLV canceled the original solicitation and ultimately requested a second round
11 of bids in October 2011. Among other things, CNLV changed the duration of the Project from 18
12 months to 12 months.

13 4. On or about October 26, 2011, APCO submitted its second bid to CNLV for the
14 Project with a 12-month schedule.

15 5. CNLV issued its notice to proceed to APCO on January 11, 2012. APCO started
16 work on the Project on approximately January 16, 2012.

17 6. Helix mobilized its equipment and started work full time on or about February 20,
18 2012.

19 7. In the spring of 2012, APCO entered into a construction agreement (the “Prime
20 Contract”) with the CNLV in which APCO agreed to serve as the general contractor on the
21 Project.

22 8. Section 6.3.2 the General Conditions of the Prime Contract which are incorporated
23 into the Subcontract, states in part:

24
25
26
27 ¹ In the pretrial statement, the parties have stipulated that the Contract time was extended from January 2013
28 into November 2013 through no fault of either APCO or Helix.

1 [a]ll other claims notices for extra work shall be filed in writing to the Construction
2 Manager prior to the commencement of such work. Written notices shall use the words
3 "Notice of Potential Claim." Such Notice of Potential Claim shall state the circumstances
4 and all reasons for the claim, but need not state the amount.

5 9. After receiving the notice of proposed award, APCO agreed to contract terms with
6 Helix subject to certain specially negotiated terms modifying the form subcontract ("Helix
7 Addendum").

8 10. As part of the negotiation, APCO agreed to purchase certain materials totaling
9 \$2,248,248 as specified by Helix, which was to be removed from Helix's original proposed scope
10 and pricing.

11 11. Helix entered into an agreement with APCO to provide certain electrical related
12 labor, materials and equipment (the "Work") to the Project for the lump sum amount of
13 \$2,356,520.

14 12. On or about April 19, 2012, APCO and Helix entered into a formal subcontract for
15 the electrical work required on the Project (the "Subcontract").

16 13. Helix's Daily Reports, Certified Pay Roll Records and the Project Sign-in Sheets
17 establish that Helix started performing work for the Project as early as January 23, 2012, and
18 mobilized on the Project on or about February 28, 2012.

19 14. Pursuant to Exhibit "A" of the Subcontract, Helix was required to supply "all
20 labor, materials, tools, equipment, hoisting, forklift, supervision, management, permits and taxes
21 necessary to complete all of the scope of work" for the 'complete electrical package' for the
22 Project.
23

24 15. Section 6.5 contains a "no damage for delay" provision.
25

26 If Subcontractor shall be delayed in the performance of the Work by any act or neglect of
27 the Owner or Architect, or by agents or representatives of either, or by changes ordered in
28 the Work, or by fire, unavoidable casualties, national emergency, or by any cause other
that [SIC] the intentional Interference of Contractor, Subcontractor shall be entitled, as
Subcontractor's exclusive remedy, to an extension of time reasonably necessary to

1 compensate for the time lost due to the delay, but only if Subcontractor shall notify
2 Contractor in writing within twenty four (24) hours after such occurrences, and only if
3 Contractor shall be granted such time extension by Owner.

4 This clause was not modified by the Helix Addendum.

5 16. Section 6.7 of the Subcontract provided in pertinent part:

6 Contractor shall not be liable to Subcontractor for delays caused by reason of fire or other
7 casualty, or on account of riots, strikes, labor trouble, terrorism, acts of God, cataclysmic
8 event, or by reason of any other event or cause beyond Contractor's control, or
9 contributed to by Subcontractor.

10 Section 6.7 was not modified by the Helix Addendum.

11 17. The Parties Contract requires proof of actual cost increase. Section 7.1—which
12 was unchanged by the Helix Addendum—provides:

13 Contractor may order or direct changes, additions, deletions or other revisions in the
14 Subcontract work without invalidating the Subcontract. No changes, additions, deletions,
15 or other revisions to the Subcontract shall be valid unless made in writing. Subcontractor
16 markup shall be limited to that stated in the contract documents in addition to the
17 direct/actual on-site cost of the work, however, no profit and overhead markup on
18 overtime shall be allowed.

19 18. Section 7.2 as modified by the Helix Addendum, provided:

20 Subcontractor, prior to the commencement of such changed or revised work, shall submit,
21 (within 5 days of Contractor's written request) to Contractor, written copies of the
22 breakdown of cost or credit proposal, including work schedule revisions, for changes,
23 additions, deletions, or other revisions in a manner consistent with the Contract
24 Documents. Contractor shall not be liable to Subcontractor for a greater sum, or
25 additional time extensions, than Contractor obtains from Owner for such additional work.

26 19. The parties negotiated additional language that was included in Section 6 by the
27 Helix Addendum:

28 In the event the schedule as set forth above is changed by Contractor for whatever reason
so that Subcontractor either is precluded from performing the work in accordance with
said schedule and thereby suffers delay, or, is not allowed the number of calendar days to
perform the work under such modified schedule and must accelerate its performance, then
Subcontractor shall be entitled to receive from Contractor payment representing the costs
and damages sustained by Subcontractor for such delay or acceleration, providing said
costs and damages are first paid to Contractor.

20. Section 4.4 of the Subcontract—as amended by the Helix Addendum provides:

1 Progress payments will be made by Contractor to Subcontractor within 10 calendar days
2 after Contractor actually receives payment for Subcontractor's work from Owner. The
3 progress payment to Subcontractor shall be one hundred percent (100%) of the value of
4 Subcontract work completed (less 10% retention) during the preceding month as
5 determined by the Owner, less such other amounts as Contractor shall determine as being
6 properly withheld as allowed under this Article or as provided elsewhere in this
7 Subcontract. The estimates of Owner as to the amount of Work completed by
8 Subcontractor shall be binding upon Contractor and Subcontractor and shall conclusively
9 establish the amount of Work performed by Subcontractor. As a condition precedent to
10 receiving partial payments from Contractor for Work performed, Subcontractor shall
11 execute and deliver to Contractor, with its application for payment, a full and complete
12 release (Forms attached) of all claims and causes of action Subcontractor may have
13 against Contractor and Owner through the date of the execution of said release, save and
14 except those claims specifically listed on said release and described in a manner sufficient
15 for Contractor to identify such claim or claims with certainty. Upon the request of
16 Contractor, Subcontractor shall provide an Unconditional Waiver of Release in form
17 required by Contractor for any previous payment made to Subcontractor. Any payments
18 to Subcontractor shall be conditioned upon receipt of the actual payments by Contractor
19 from Owner. Subcontractor herein agrees to assume the same risk that the Owner may
20 become insolvent that Contractor has assumed by entering into the Prime Contract with
21 the Owner per NRS Statutes.

22 21. The Subcontract also incorporated the Prime Contract, which included the claim
23 procedures set forth in the Contract.

24 22. Helix assigned Kurk Williams as its Project Manager. Williams never signed in
25 using APCO's sign in sheets that were maintained at the Project site. By his own admission,
26 Williams' time devoted to the Project was not accurately tracked in Helix's certified payroll
27 reports, only Helix's job cost report.

28 23. Richard Clement was Helix's Project Superintendent. Clement was on site
occasionally and signed in with APCO at the Project twice during 2012.

24 24. Clement did not work on the Project between June 11, 2012 and September 26,
25 2012. Clement only worked two weeks on the Project from September 27, 2012 to October 7,
26 2012. Clement did not work on the Project from October 8, 2012 through January 20, 2013. In
27 all of 2013, which was the extended Project time, Clement only worked 32 hours during the week
28 ending January 27, 2013.

1 25. In late January 2013, Helix assigned Clement to another project and designated
2 Rainer Prietzel, Helix's Foreman to oversee work in the field, as the new Project Superintendent
3 and foreman.

4 26. According to the Labor Commissioner, and OSHA regulations, Helix must always
5 have a project superintendent on site at all times during the Project.
6

7 27. From January 2013 to May 2013, Helix typically had a three to five man crew on
8 the Project.

9 28. In early May 2013, with the exception of a few days, Prietzel was the only Helix
10 employee on the Project, and he split his time as the Project Superintendent and self-performing
11 contract and change order work on the Project.

12 29. Prietzel remained the Project Superintendent until the end of the Project in mid-
13 October 2013.
14

15 30. Helix's original line item for its general conditions, as reflected in its pay
16 application, was \$108,040 on a Subcontract price of \$2,380,085, which represents 4.5%.

17 31. The Project encountered significant delays and was not substantially completed
18 until October 25, 2013, thus resulting in Helix claiming approximately, \$138,000 in additional
19 extended overhead costs.
20

21 32. The project was never abandoned by CNLV.

22 33. Prior to the original project completion date passing, on January 9, 2013, APCO
23 submitted its first request for an extension of time to CNLV. APCO submitted its Time Impact
24 Analysis #1 ("TIA #1") to CNLV where it sought extended general conditions and home office
25 overhead of \$418,059 (\$266,229 for general conditions and \$151,830 for home office overhead).

26 34. Helix first notified APCO in writing that it would be asserting a claim for extended
27 overhead costs on January 28, 2013 and reserved its rights to submit a claim for "all additional
28

1 costs incurred due to scheduled delays for this project" (the "Claim").

2 35. As of May 9, 2013, CNLV had not made a decision on APCO's TIA #1.

3 36. On May 9, 2013, APCO submitted a revised Time Impact Analysis ("TIA #2") to
4 CNLV seeking an additional five (5) months of compensation for general conditions and home
5 office overhead, among other claims, for a total delay claim of nine (9) months.
6

7 37. As part of TIA #2, APCO submitted Change Order Request No. 39.1 to CNLV
8 seeking compensation of \$752,499 for its extended general conditions and home office overhead
9 (\$479,205 for general conditions and \$273,294 for home office overhead).

10 38. This represented approximately seventy percent (70%) of APCO's \$1,090,066.50
11 total claim against CNLV for the 9-month delay to the Project.
12

13 39. APCO's claim did not include any amounts for its subcontractors, and APCO
14 acknowledges that as a company policy, it does not include its subcontractors' claims with its
15 own claims.

16 40. Through no fault of APCO, Helix did not take delivery of various light poles and
17 related equipment until approximately January 30, 2013.

18 41. On June 19, 2013, APCO and Helix exchanged emails regarding various Project
19 issues, including Helix's delay rates. APCO confirmed that if Helix submitted a request for
20 compensation that it would be forwarded to CNLV.
21

22 42. On June 19, 2013 Helix provided a supplemental notice of claim but did not
23 provide any back up to support its daily rates or the impacts alleged to be attributed to the delay.
24 At that time, Helix still only had Prietzel working on site.

25 43. On June 21, 2013 Helix and APCO exchanged emails related to the support for
26 Helix's claimed costs, with APCO noting that a project manager was considered home office
27 overhead. Helix indicated that its job cost reports would reflect the actual costs for the extended
28

1 overhead.

2 44. In June 2013, Helix realized the Project was still several months away from being
3 completed. According to Helix's June 19 letter entitled "Extended overhead cost", Helix's cost
4 for extended overhead was \$640/day.

5 45. The \$640/day cost is comprised of (1) \$260 for the Project Manager; (2) \$280 for
6 the Superintendent; (3) \$25 for the site trailer; (4) \$5 for the Connex box; (5) \$25 for the forklift;
7 and (6) \$45 for the truck.

8 46. The email that accompanied Helix's June 19, 2013 letter advised APCO that to
9 date, Helix's Claim totaled \$72,960, but that Helix's Claim would increase for each day the
10 Project continued past the original completion date.

11 47. Also on June 19, 2013, APCO informed Helix, by way of an email, that it "is in
12 the process of presenting CNLV with a Time Impact Analysis containing facts as to why the
13 additional costs should be paid." APCO had submitted TIA #2 to CNLV on May 9, 2013, six
14 weeks prior to this email.

15 48. In the email, APCO further advised Helix that "[o]nce we fight the battle, and
16 hopefully come out successfully, this will open the door for Helix...to present their case for the
17 same."

18 49. While APCO notified Helix that it would forward to CNLV any letter Helix
19 provided regarding its claim for extended overhead costs, APCO did not inform Helix that it
20 needed Helix's Claim immediately so it could include it with APCO's claim to CNLV. Indeed,
21 according to APCO, it would first "fight that battle, and hopefully come out successfully..."
22 which would only then "open the door for Helix...to present their case..."

23 50. On August 27, 2013, despite the fact that the Project was still ongoing, Helix
24 furnished APCO with its first invoice for its Claim in the amount of \$102,400, which constituted
25
26
27
28

1 32 weeks of extended overhead costs incurred between January 13, 2013, and August 30, 2013
2 (or 160 business days).

3 51. Helix's invoice identified an extended overhead cost of \$640/day for 32 weeks,
4 which had been provided to APCO in June 2013.

5 52. From May 6, 2013 through November 6, 2013, Prietzel was the only Helix person
6 on site. Prietzel confirmed that during that time period he was either working on completing
7 original Subcontract work for which Helix would be paid or change order work that was
8 acknowledged and paid by APCO and CNLV.

9 53. During construction, CNLV made changes or otherwise caused issues that
10 impacted Helix. In those instances, Helix submitted a request for additional compensation and
11 CNLV issued APCO change orders that compensated Helix for the related impacts. During the
12 extended Contract time, CNLV issued eleven change orders that resulted in additional
13 compensation to Helix through the Subcontract. Helix's pricing for the change orders included a
14 10% markup on materials and a 15% markup on labor to cover Helix's overhead.

15 54. APCO submitted Change Order Request No. 68 ("COR 68") to CNLV on
16 September 9, 2013, requesting compensation for Helix's Claim.

17 55. On September 16, 2013, CNLV rejected the COR 68 stating, "This COR is
18 REJECTED. The City of North Las Vegas does not have a contract with Helix Electric."

19 56. CNLV stated that it did not reject COR 68 for lack of backup or untimeliness.

20 57. The Construction Manager for CNLV during the Project, Joemel Llamado,
21 testified that the only reason he rejected Helix's Claim was because CNLV did not have a
22 contract with Helix. APCO should have included Helix's Claim in its own claim to CNLV since
23 Helix's Subcontract was with APCO, not CNLV.

24 58. Llamado did not look at the merits of the Claim because the Claim should have
25
26
27
28

1 been included with APCO's claim.

2 59. APCO informed Helix that CNLV rejected COR 68 because of lack of backup
3 documentation.

4 60. On October 2, 2013, CNLV issued its decision on APCO's request for additional
5 time and compensation. CNLV determined that the time period from January 11, 2013 to May
6 10, 2013 was an excusable but not compensable delay. APCO was not charged liquidated
7 damages, but also was not provided compensation from January thru May 10, 2013. CNLV did
8 confirm that it would pay APCO \$560,724.16 for the delay from May 10, 2013 to October 25,
9 2013. APCO accepted that determination on or about October 10, 2013.

10 61. On October 3, 2013, APCO sent Helix a letter requesting additional back-up
11 documentation for the Claim so it could resubmit the Claim to CNLV.

12 62. That letter states in relevant part:

13 Attached is your invoice of August 27, 2013 in the amount of \$102,400. At this time
14 APCO has not received any back-up documentation to undo the previous formal rejection
15 made by the City of North Las Vegas. If you want APCO to re-submit your request,
16 please provide appropriate back-up for review.

17 63. On October 2, 2013, CNLV and APCO entered into a settlement agreement
18 through which CNLV agreed to pay APCO \$560,724.16 for its claim submitted under TIA #2,
19 including APCO's claim for added overhead and general conditions it incurred as a result of the
20 nine-month delay to the Project.

21 64. According to that settlement agreement, APCO agreed to "forgo any claims for
22 delays, disruptions, general conditions and overtime costs associated with the weekend work
23 previously performed...and for any other claim, present or future, that may occur on the project.

24 65. APCO did not notify Helix that it had entered into this settlement agreement.

25 66. Llamado's position was that the settlement agreement resolved any and all claims
26 between CNLV and APCO for the nine-month delay to the Project, including any claims APCO's
27 28

1 subcontractors might have.²

2 67. Pursuant to this settlement agreement, CNLV issued Change Order No. 50 to
3 APCO and agreed to pay APCO \$560,724.16 for the added overhead and general conditions it
4 incurred as a result of the extended project completion date.

5 68. On October 3, 2013, APCO transmitted to Helix CNLV's rejection of its invoice
6 for extended overhead.

7 69. Near the end of the Project in October 2013, Pelan, notified Helix, that Helix could
8 not include the Claim for extended overhead in Helix's pay application for retention because
9 CNLV would not release the retention on the Project if there were outstanding Claims on the
10 Project.
11

12 70. In compliance with Pelan's instructions, on October 18, 2013, Helix submitted its
13 Pay Application for Retention only in the amount of \$105,677.01 and identified it as Pay
14 Application No. 161113-002 (the "Retention Pay App").
15

16 71. On October 18, 2013, Helix submitted its pay application for the time period up
17 through October 30, 2013. At that time, Helix billed its general conditions line item at 100%.

18 72. On October 18, 2013, Helix submitted its pay application for the release of
19 retention. As with prior pay applications, Helix enclosed a conditional waiver. The release was
20 conditioned on APCO issuing a final payment in the amount of \$105,677.01 and expressly
21 confirmed that there were "zero" claims outstanding. Helix signed and provided that release to
22 APCO after receiving CNLV's rejection of its extended overhead invoice.
23

24 73. Helix also provided to APCO a "Conditional Waiver and Release Upon Final
25 Payment" (the "Conditional Waiver") for the Retention Pay App only (i.e. Pay App No. 161113-
26

27 ² Joe Pelan, the Contract Manager for APCO, disagreed with this position, but APCO and Helix did not test it
28 through the claims process provided in the Prime Contract.

1 002).

2 74. Helix indicated in the Conditional Waiver that there was no "Disputed Claim
3 Amount" relating to the Retention Pay App.

4 75. Helix takes the position that the Conditional Waiver was not intended to release
5 Helix's Claim.

6 76. The evidence presented at trial of the circumstances surrounding the execution of
7 the Conditional Waiver do not support Helix's waiver of the Claim.

8 77. It took APCO more than a year to pay Helix for its Retention Pay App, during
9 which time, Helix made it clear to APCO that it would continue pursuing its Claim.

10 78. Between October 2013 and the end of October 2014 when APCO finally paid
11 Helix its retention, APCO forwarded Helix's Claim to CNLV on two separate occasions and
12 received multiple written notices from Helix that it maintained its Claim against APCO.

13 79. The project was substantially completed on October 25, 2013.

14 80. On October 31, 2013, in order to account for certain overhead items that were
15 omitted from the original Claim, Helix: (i) increased its Claim from \$102,400 to \$111,847; (ii)
16 resubmitted its Invoice to APCO; and (iii) provided additional backup information and
17 documents. Included with the revised invoice was a monthly breakdown of Helix's Claim from
18 January to August, which included the following categories of damages: (1) Project Manager; (2)
19 Project Engineer; (3) Superintendent; (4) Site trucks; (5) Project Fuel; (6) Site Trailer; (7) Wire
20 Trailer; (8) Office supplies; (9) Storage Connex boxes; (10) forklifts; (11) small tools; and (12)
21 consumables. According to the summary of the Claim, Helix charged the Project 4-hours a day
22 for its Project Manager, Kurk Williams at \$65/hour, and 4-hours a day for its Superintendent, Ray
23 Prietzel at \$70/day.

24 81. On or about November 5, 2013, three weeks after APCO received Helix's
25
26
27
28

1 Retention Pay App and Conditional Waiver, APCO submitted a revised COR 68 (68.1) to CNLV
2 seeking a total of \$111,847 for Helix's Claim.

3 82. Had APCO believed Helix's Conditional Waiver for the Retention Pay App
4 (received on October 18, 2013) waived any and all claims Helix had on the Project, including its
5 Claim for extended overhead, APCO would not have submitted revised COR 68.1 to CNLV three
6 weeks after receiving Helix's Conditional Waiver.

7
8 83. On November 18, 2013, CNLV again rejected the Change Order Request stating,
9 "This is the 2nd COR for Helix Electric's extended overhead submittal. The 1st one was submitted
10 on Sept. 9, 2013 and Rejected on Sept. 16, 2013. This submittal dated Nov. 5, 2013 is
11 REJECTED on Nov. 13, 2013."

12 84. Llamado's second rejection had nothing to do with lack of backup documents or
13 untimeliness and was rejected simply because APCO should have included Helix's Claim under
14 its own claim to CNLV.

15
16 85. By this time, APCO had already settled with CNLV to receive payment for its own
17 extended overhead costs, and in doing so, waived and released any further claims against CNLV,
18 including Helix's Claim.

19 86. As Helix had previously informed APCO it would, on or about November 13,
20 2013, Helix submitted to APCO another invoice including backup in the amount of \$26,304
21 accounting for the extended overhead costs for September and October ("COR 93").

22
23 87. APCO confirmed to Helix's Kurk Williams that there would be no APCO
24 approval unless and until CNLV approved Helix's request.

25 88. CNLV rejected COR 93.

26 89. By submitting COR 93 to CNLV on November 13, 2013, APCO once again
27 acknowledged that it knew Helix's Conditional Waiver submitted on October 18, 2013 related to
28

1 the Retention Pay App only, and did not waive Helix's Claim for extended overhead.

2 90. If APCO believed the Conditional Waiver released Helix's Claim, APCO would
3 not have continued to submit Helix's Claim to CNLV.

4 91. On January 28, 2014, APCO sent Helix's Victor Fuchs and Bob Johnson an email
5 confirming that he was meeting with CNLV to discuss the remaining change order issues on
6 February 4, 2014. Pelan testified that, CNLV advised APCO that it was rejecting Helix's claim
7 because it had no merit and Helix only had one person on the Project while completing Helix's
8 contract work in 2013. Pelan reported CNLV's position to Helix.³

9 92. The Subcontract incorporated APCO's prime contract with CNLV in Section 1.1,
10 which sets forth CNLV's claims procedure for requests for payment that are escalated to claims.
11 Helix did not request that APCO initiate these proceedings on its behalf regarding the claim for
12 extended overhead.
13

14 93. On March 31, 2014, CNLV and APCO agreed that there would be no further
15 COR's submitted on the Project.
16

17 94. On April 16, 2014, Helix's Victor Fuchs threatened to convert the outstanding
18 issues into a claim if Helix's retention was not released per its pay application and release that
19 were submitted on October 18, 2013.
20

21 95. APCO admitted that on June 10, 2014, it received final retention from CNLV.

22 96. However, because APCO had not paid Helix its Retention or its Claim, Helix sent
23 APCO another demand for payment on September 26, 2014, seeking payment for both its
24 Retention and the Claim.

25 97. CNLV issued the formal notice of completion of the project on July 8, 2014.
26

27 ³ While the Court finds Pelan's testimony on this issue credible, the testimony of Llamado
28 differs.

1 98. On October 21, 2014, APCO issued check number 1473 in the amount of
2 \$105,679, which represented final payment of Helix's retention, in accordance with the October
3 18, 2013 retention billing and related final release.⁴

4 99. On October 29, 2014, APCO sent Helix an email requesting that it sign a new
5 Conditional Waiver and Release Upon Final Payment which included Helix's Retention only, but
6 did not include any disputed amount for the Claim.
7

8 100. Attached to that email was a copy of the Retention Check APCO informed Helix it
9 could pickup once it received the new executed Conditional Release.

10 101. Upon receiving the new Conditional Waiver and before picking up the Retention
11 Check, Helix notified APCO that it was not going to sign the new Conditional Waiver without
12 reserving a right to its Claim.
13

14 102. APCO invited Helix to revise the new Conditional Waiver as it saw fit, and Helix
15 provided an unsigned copy of it seeking full payment of the Claim and the Retention for a total
16 amount of \$243,830.

17 103. APCO declined to pay the Claim, and after additional discussions between Helix
18 and APCO, it was decided that Helix would exchange for the Retention Check an Unconditional
19 Waiver and Release Upon Final Payment seeking payment of \$105,679 for Retention, and
20 reserving as its Disputed Claim, \$138,151.
21

22 104. As part of the "Disputed Claim" field, Helix referenced additional correspondence
23 which it had incorporated into the Unconditional Waiver and Release.

24 105. Helix included a letter dated October 30, 2014 clarifying that while it was
25 demanding its retention payment, it was also seeking payment for its Claim in the amount of
26

27 ⁴ Because of this lengthy delay in payment, Helix is entitled to interest on the retention amount under NRS
28 338.

1 \$138,151 for which it also provided a final invoice.

2 106. In one such email, Helix writes, "Joe, please accept this email as a 30 day
3 extension of time for the execution of [the] promissory note attached...In good faith we [are]
4 extending this time per your request, so you can come up with an arrangement to repay the
5 outstanding amount that is past due."
6

7 107. APCO never executed the Promissory Note or paid Helix its Claim.

8 108. On October 29, 2014, APCO tendered the check and another signed release for
9 final payment. That release mirrored the one that Helix submitted in October 2013.

10 109. On October 29, 2014, Helix's Victor Fuchs sent an email to Pelan stating: "this is
11 not going to work." Pelan responded that same day stating: "Victor, make changes for me to
12 approve. Thanks."
13

14 110. On October 18, 2013, the Senior Vice President of Helix, Robert D. Johnson,
15 signed a "Conditional Waiver and Release Upon Final Payment".

16 111. Helix received the funds on October 29, 2014.

17 112. On October 30, 2014, the day after negotiating the final payment check, Helix
18 tendered a signed final lien release that purported to reserve Helix's extended overhead invoices
19 in the amount of \$138,151.
20

21 113. Helix has established how certain of its costs increased due to the extended time
22 on the Project given its demobilization and reduction in crew size. Prietzel was the only person
23 on site after May 6, 2013 and he was completing base Subcontract work and change order work
24 that was paid by CNLV.

25 114. After weighing the testimony of the witnesses and a review of the admitted
26 documents, the Court finds, that the delay was not so unreasonable to amount to abandonment
27
28

1 and that therefore the provision limiting damages after a delay does not permit the recovery of
2 extended general conditions.

3 115. Since CNLV determined that the delays through May 13, 2013 were not
4 compensable, the only time period that APCO recovered payment for its delay costs was May 13,
5 2013 through October 13, 2013. During that same compensable time period, Helix's reasonable
6 costs totaled \$43,992.39.⁵ Although Helix was earning revenue and being paid during the time
7 period for the Work and certain approved change orders, APCO by its settlement with CNLV,
8 impaired Helix's ability to pursue the Claim.
9

10 116. Helix has supported its claim for certain additional costs. As Prietzel was paid for
11 his time on site under the approved change orders the claimed expense for acting as a
12 superintendent (supervising only himself) is not appropriate.
13

14 117. After weighing the testimony of the witnesses and a review of the admitted
15 documents, the Court finds, Helix has established that it suffered damages as a result of the delay
16 in project completion in the amount of \$43,992.39.

17 118. If any findings of fact are properly conclusions of law, they shall be treated as if
18 appropriately identified and designated.
19

20 CONCLUSIONS OF LAW

21 1. The Subcontract was a valid contract between Helix and APCO.
22

23 ⁵ The Court has utilized the summary used as D5 during the trial with the deletion of the line item
24 "Superintendent". Those totals for the compensable months with that modification are:

25 May 13	\$8501.05
26 June 13	\$7124.90
27 July 13	\$8270.69
28 August 13	\$6785.04
September 13	\$6170.56
October 13	\$7140.15
TOTAL	\$43992.39

1 2. The Court finds that the Conditional Waiver Helix submitted to APCO on or about
2 October 2013 did not constitute a waiver of Helix's Claim.

3 3. APCO's own conduct establishes that it knew Helix was not waiving its Claim as
4 it continued to submit Helix's Claim to CNLV after receiving the Conditional Waiver.

5 4. Helix provided sufficient evidence establishing that it incurred damages as a result
6 of the Project schedule extending nine months past its original completion date.

7 5. APCO had a duty to include Helix's Claim in its own claim to CNLV or otherwise
8 preserve the Claim when it settled, which it failed to do.

9 6. APCO's internal policy and decision to keep Helix's Claim separate from its own
10 claim impaired Helix's ability to pursue the Claim.

11 7. When APCO entered into the settlement agreement with CNLV on October 3,
12 2013 without Helix's knowledge, CNLV took the position that APCO waived and released any
13 and all claims arising from the nine month Project delay, including Helix's Claim.

14 8. In every contract, there is an implied covenant of good faith and fair dealing.

15 9. APCO's impairment of Helix's Claim constitutes a breach of the covenant of good
16 faith and fair dealing implied in the Subcontract.

17 10. APCO breached the covenant of good faith and fair dealing when it, without
18 notifying Helix, settled its claim with CNLV for extended general conditions, impairing Helix
19 from pursuing any pass-through claims to CNLV for its Claim, but continued to submit Helix's
20 Claim to CNLV knowing that CNLV rejected it because it had no contractual privity with Helix,
21 and now APCO had released any and all claims against CNLV.

22 11. Helix is entitled to judgment against APCO under its claim for Breach of Implied
23 Covenant of Good Faith and Fair Dealing and its damages are the damages it has established for
24

1 in the amount of \$43,992.39.⁶

2 12. Because the Project was a public works project, it was governed under NRS
3 Chapter 338.

4 13. Under NRS 338.490, a conditional waiver and release can only release payments
5 for work which is the subject of the payment application to which the wavier and release
6 corresponds.

7
8 14. The Conditional Waiver Helix provided APCO on October 18, 2013, was for
9 retention only and expressly referred to the Retention Pay App (Pay Application No. 161113-022)
10 which sought retention only.

11 15. The Retention Pay App did not include Helix's Claim.

12 16. Therefore, because by statute, the Conditional Waiver can only release work that is
13 the subject of the Retention Pay App, it did not constitute a waiver and release of Helix's Claim.
14

15 17. NRS 338.565 states in relevant part:

16 If a contractor makes payment to a subcontractor or supplier more
17 than 10 days after the occurrence of any of the following acts or
18 omissions: (a) the contractor fails to pay his or her subcontractor or
19 supplier in accordance with the provisions of subsection 1 of NRS
20 338.550...the contractor shall pay to the subcontractor or supplier,
21 in addition to the entire amount of the progress bill or the retainage
22 bill or any portion thereof, interest from the 10th day on the amount
23 delayed, at a rate equal to the lowest daily prime rate...plus 2
24 percent, until payment is made to the subcontractor or supplier.

25 18. NRS 338.550(1) required APCO to pay Helix its retention within 10 days of
26 receiving its retention payment from CNLV.

27 ⁶ The Court has not awarded separate damages for the breach of contract claim as those would be duplicative
28 of this award.

1 19. APCO admits it received its retention payment from CNLV on June 10, 2014, yet
2 it did not pay Helix its retention until October 30, 2014, more than four months later and in
3 violation of NRS 338.550(1).

4 20. APCO was required to pay Helix its retention amount of \$105,677.01, in addition
5 to interest at the rate of prime plus 2 percent from June 10, 2014 through October 30, 2014.
6 APCO failed to do so.

7 21. After providing APCO with the Conditional Waiver, Helix incurred additional
8 damages that could not be waived by way of the Conditional Waiver (i.e. the interest on its
9 wrongfully withheld retention).

10 22. On June 10, 2014, APCO received final retention from CNLV.

11 23. APCO failed to pay Helix its retention in the amount of \$105,679 until October 29,
12 2014.

13 24. Pursuant to NRS 338.550(1), APCO was required to pay Helix its retention no
14 later than June 21, 2014.

15 25. As a result of APCO's failure, and pursuant to NRS 338.565(1), APCO is required
16 to pay Helix interest on \$105,677.01 from June 22, 2014 through October 28, 2014, at a rate of
17 5.25% for a total of \$1,960.85.

18 26. Even if the pay-if-paid clause was enforceable, APCO cannot rely upon it to shield
19 itself from liability to Helix when its decision to submit Helix's Claim separately from its claim
20 led to CNLV rejecting Helix's Claim, and APCO's settlement with CNLV forever barred APCO
21 from receiving payment from CNLV for Helix's Claim.

22 27. To the extent the delays were caused by CNLV, APCO is still liable to Helix since
23 it impaired those claims in contradiction to NRS 624.628(3)(c) by entering into a settlement
24 agreement with CNLV on October 2, 2013.

1 28. Because this Court has found APCO breached the Subcontract and breached the
2 covenant of good faith and fair dealing, Helix is entitled to judgment against Safeco and the
3 Payment Bond as well.

4 29. NRS 339.025(1)(b) provides the following:

5
6 1. Before any contract,..., exceeding \$100,000 for any project
7 for the new construction, repair or reconstruction of any public
8 building or other public work or public improvement of any
9 contracting body is awarded to any contractor, the contractor shall
furnish to the contracting body the following bonds which become
binding upon the award of the contract to the contractor;

10 a.

11 b. A payment bond in an amount to be fixed by the
12 contracting body, but not less than 50 percent of the contract
13 amount, conditioned upon the faithful performance of the
14 contract in accordance with the plans, specifications and
15 conditions of the contract. The bond must be solely for the
protection of claimants supplying labor or materials to the
contractor to whom the contract was awarded, or to any of his
or her subcontractors, in the prosecution of the work provided
for in such contract.

16 30. NRS 339.035(1) provides:

17 ...any claimant who has performed labor or furnished material in
18 the prosecution of the work provided for in any contract for which
19 a payment bond has been given pursuant to the provisions of
20 subsection 1 of NRS 339.025, and who has not been paid in full
21 before the expiration of 90 days after the date on which the
22 claimant performed the last of such labor or furnished the last of
23 such materials for which the claimant claims payment, may bring
an action on such payment bond in his or her own name to recover
any amount due the claimant for such labor or material, and may
prosecute such action to final judgment and have execution on the
judgment.

24 31. SAFECO issued a Labor and Material Payment Bond, Bond No. 024043470,
25 wherein APCO is the principal and SAFECO is the surety.

26 32. Helix provided Work to the Project and remains unpaid for the same.

27 33. Therefore, Helix is a claimant against the Bond and may execute a judgment
28

1 against the same.

2 34. Section 20.5 of the Subcontract provides that “ [i]n the event either party employs
3 an attorney to institute a lawsuit or to demand arbitration for any cause arising out of the
4 Subcontract Work or the Subcontract, or any of the Contract Documents, the prevailing party
5 shall be entitled to all costs, attorney’s fees and any other reasonable expenses incurred therein.”
6

7 35. This provision was not modified by the Helix Addendum.

8 36. The Court finds that Helix is the prevailing party and is entitled to an award of its
9 attorneys’ fees and costs.

10 37. If any conclusions of law are properly findings of fact, they shall be treated as if
11 appropriately identified and designated.

12 Based upon the foregoing Findings of Fact and Conclusions of Law **IT IS HEREBY**
13 **ORDERED, ADJUDGED AND DECREED** as follows:
14

15 1. **IT IS HEREBY ORDERED** that, as to Plaintiff’s Claim for Breach of Contract
16 against APCO, this Court finds in favor of Plaintiff but as the Claim was impaired
17 awards damages under the Breach of the Implied Covenant of Good Faith and
18 Fair Dealing, rather than awarding duplicative damages;

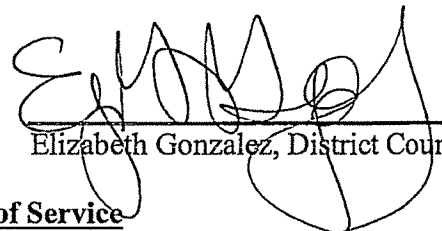
19 2. **IT IS FURTHER ORDERED** that, as to Plaintiff’s Claim for Breach of the
20 Implied Covenant of Good Faith and Fair Dealing against APCO, this Court finds
21 in favor of Plaintiff and awards damages in the amount of \$43,992.39 together
22 with interest as provided by law and taxable costs of suit;

23 3. **IT IS FURTHER ORDERED** that, as to Plaintiff’s Claim for violations of NRS
24 338 against APCO, this Court finds in favor of Plaintiff in the amount of
25 \$1,960.85;⁷
26
27

28 ⁷ These damages are in addition to those awarded under the claim of Breach of the Implied Covenant of Good

- 1 4. **IT IS FURTHER ORDERED** that, given the Court's findings against APCO,
2 the Court finds in favor of Plaintiff and against Safeco and the Bond;
3 5. **IT IS FURTHER ORDERED** that this Court will address any issues of
4 attorneys' fees through motions that may be filed with the Court.
5 6. Any claim not otherwise disposed of by this decision is dismissed.
6

7 DATED this 8th day of July, 2019.
8

9 
10 Elizabeth Gonzalez, District Court Judge
11

12 **Certificate of Service**

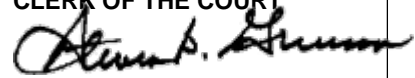
13 I hereby certify that on the date filed, a copy of the foregoing Scheduling Order and
14 Order Setting Civil Jury Trial, Pre-Trial and Calendar Call was electronically served, pursuant to
15 N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing
16 Program.
17

18 
19 Dan Kutinac
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28 Faith and Fair Dealing.

Exhibit 4

Exhibit 4



MCLA

John Randall Jefferies, Esq. (Bar No. 3512)

Brandi M. Planet, Esq. (Bar No. 11710)

FENNEMORE CRAIG, P.C.

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Attorneys for APCO Construction, Inc.

and Safeco Insurance Company of America

DISTRICT COURT

CLARK COUNTY, NEVADA

HELIX ELECTRIC OF NEVADA, LLC, a
Nevada limited liability company,

Plaintiff,

v.

APCO CONSTRUCTION, a Nevada
corporation; SAFECO INSURANCE
COMPANY OF AMERICA; DOES I through
X; and BOE BONDING COMPANIES, I
through X, Defendants.

Case No.: A-16-730091-C

Dept. No.: XVII

HEARING REQUESTED

**APCO CONSTRUCTION, INC.'S AND
SAFECO INSURANCE COMPANY OF
AMERICA'S MOTION FOR
CLARIFICATION AND/OR AMENDMENT
TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

APCO Construction, Inc. and Safeco Insurance Company of America (collectively referred to as "APCO"), by and through their attorneys, Fennemore Craig, P.C., hereby move this Court for an Order reconsidering and amending the Findings of Fact and Conclusions of Law ("Findings") entered by this Court on July 10, 2019. Given the factual and legal findings and rulings, Helix is not entitled to any extended general conditions. Alternatively, given the Court's specific findings, APCO respectfully submits that the Court applied incorrect figures that effectively award Helix Electric of Nevada, LLC ("Helix") Project Manager figures that are based on billed and unsupported rates and not the actual job cost figures that Court found were the most appropriate measure of Project Manager expenses. In short, the Court did not use the column on Exhibit D5 that reflects the actual job costs for a project manager who was largely not involved during

1 the “compensable time period.”¹ For these reasons, APCO requests reconsideration and
2 amendment of the Findings.

3 This Motion is supported by the attached memorandum of points and authorities, all
4 exhibits attached hereto and all papers and pleadings on file herein.

5 DATED July 15, 2019.

6 **FENNEMORE CRAIG, P.C.**

7
8 By: Brandi M. Planet

9 John Randall Jefferies, Esq. (Bar No. 3512)

10 Brandi M. Planet, Esq. (Bar No. 11710)

11 Chelsie A. Adams, Esq. (Bar No. 13058)

12 FENNEMORE CRAIG, P.C.

13 300 S. 4th Street, Suite 1400

14 Las Vegas, NV 89101

15 *Attorneys for APCO Construction, Inc.*

16 *and Safeco Insurance Company of America*

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¹ The “compensable time period” is May to October 2013. *See* Findings, ¶115, which is attached hereto as **Attachment A.**

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means that any recovery for Williams’ time would need to be reflected in the job cost reports to satisfy the subcontract’s actual cost requirement. The Court rejected any suggestion that Helix was entitled to four hours of everyday for Williams’ time. That is what Helix’s unsupported billings were based on, which the Court rejected.

After limiting Helix’s recovery to actual costs reflected in the job cost, the Court cited Exhibit D5. As shown in the chart below, for each month of the compensable period, Exhibit D5 showed the unsupported amount Helix was requesting for the project manager and the corresponding actual costs reflected in the job costs. For the project manager, the Court selected the wrong column for the project manager costs and awarded Helix damages based on the amount Helix billed rather than the actual costs. Findings, fn. 5. Applying the correct actual cost column, the project manager actual costs are as follows:

ACTUAL PROJECT MANAGER COSTS³	
May 2013	\$651.28
June 2013	\$4,829.98
July 2013	\$4,992.72
August 2013	\$1,845.11
September 2013	\$1,410.95
October 2013	\$1,242.71
TOTAL:	\$14,972.75

II. LEGAL ARGUMENT

NRCP 52(b) provides that upon a motion, the Court “may amend its findings—or make additional findings—and may amend the judgment accordingly.”⁴ Motions related to amending findings must be filed no later than 28 days following service of a written notice of entry of judgment. *Id.* “Further, findings of fact shall not be set aside unless they are clearly erroneous and not supported by substantial evidence.” *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243,

³ See, Exhibit D5 and Exhibit D3 (attached hereto as **Attachment C**) showing the Helix billed amounts for extended general conditions based on four hours every day for the project manager versus Helix’s partial job cost reports. D3 cross references the bates labeled pages of the actual job cost report that was marked as Exhibit 51. Each referenced page in Exhibit D3 supports the tabled actual project manager costs.

⁴ To the extent the Court intended the Findings to be a judgment, Defendants alternatively bring this Motion pursuant to NRCP 59(e), which permits a motion to “alter or amend a judgment” to be filed within 28 days after notice of the entry of the judgment.

254, 235 P.3d 592, 599 (2010); *see also*, NRCP 52(a). Since the Court entered its Findings on July 10, 2019, this motion is timely.

Using the proper column of Exhibits D5 and D3, Helix's actual cost for the project manager was \$14,972.75 during the compensable period. That figure is based on the job cost reports, which Williams cited and the Court found was the only supported cost. *See* Exhibits D5, D3 and 51.

In addition to the finding that the Project was never abandoned such that the no damage for delay clause was enforceable, APCO would further submit that this \$14,972.75 figure represents Helix's total project manager costs administering the original contract and change order work that was being performed by Prietzel. Helix never established how these costs increased due to the delay. In any event, through the misapplication of Exhibit D5, the Court awarded Helix \$35,100 for Williams' time based on the unsupported claim/billed amount, not the actual costs. Findings, fn. 5, Exhibit D5 and Exhibit D3. This award is not based Helix's actual costs and is not supported by "substantial evidence". *Bahena*, 254, 599. "The general rule...is that when there is substantial evidence to sustain the judgment, it will not be disturbed. An exception to the general rule obtains where, upon all the evidence, it is clear that a wrong conclusion has been reached." *Brechan v. Scott*, 92 Nev. 633, 634, 555 P.2d 1230, 1230 (1976).

As found by the Court, APCO should not be required to pay for costs Helix did not actually incur. APCO therefore requests that this Court amend its award by reducing the amount of damages for the project manager from \$31,500 to \$14,972.75. This will ensure that Helix is compensated only for its actual costs as the Court found was legally required by the Subcontract and factually appropriate given the inaccuracies in the certified payroll reports. Based on the Court's specific findings, Helix's total actual costs for the compensable period (excluding superintendent costs)⁵ is \$25,351.36. *See* Exhibits D5 and D3. There is no evidence that supports a higher award based on an unsupported billed amount. If the Court is not going to enforce the no damage for delay provision, APCO is entitled to and respectfully requests that the damages be

⁵ The Court excluded these damages because the superintendent was paid for his time under approved change orders. Findings, ¶116.

1 reduced to \$25,351.36. Until this issue is resolved, the Court cannot determine the prevailing
2 party or entitlement to fees and costs.

3 **III. CONCLUSION**

4 For the reasons set forth above, APCO seeks reconsideration and and/or amendment of the
5 Court's damage calculation.

6 DATED July 15, 2019.

7 **FENNEMORE CRAIG, P.C.**

8
9 By: *Brandi M. Planet*

10 John Randall Jefferies, Esq. (Bar No. 3512)

11 Brandi M. Planet, Esq. (Bar No, 11710)

12 FENNEMORE CRAIG, P.C.

13 300 S. 4th Street, Suite 1400

14 Las Vegas, NV 89101
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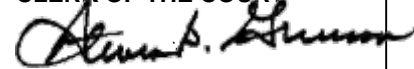
1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of Fennemore Craig, P.C., and further certify that
3 the: **APCO CONSTRUCTION, INC.'S AND SAFECO INSURANCE COMPANY OF**
4 **AMERICA'S MOTION FOR CLARIFICATION AND/OR AMENDMENT TO FINDINGS**
5 **OF FACT AND CONCLUSIONS OF LAW** was served by electronically filing via Odyssey File
6 & Serve e-filing system and serving all parties with an email address on record, pursuant to the
7 Administrative Order 14-2 and Rule 9 N.E.F.C.

8 DATED: July 15, 2019.

9
10 /s/ Morganne Westover
An Employee of Fennemore Craig, P.C.

EXHIBIT A



1 FFCL

2
3 DISTRICT COURT

4 CLARK COUNTY, NEVADA

5 HELIX ELECTRIC OF NEVADA, LLC, a
6 Nevada limited liability company,

7 Plaintiff,

8 v.

9 APCO CONSTRUCTION, a Nevada
10 corporation; SAFECO INSURANCE
11 COMPANY OF AMERICA; DOES I through
12 X; and BOE BONDING COMPANIES, I
through X,

13 Defendants.

Case No.: A-16-730091-C

Dept.: XI

14
15 ***FINDINGS OF FACT AND CONCLUSIONS OF LAW***

16 This matter having come on for non-jury trial before the Honorable Elizabeth Gonzalez
17 beginning on June 3, 2019, and continuing day to day, until its completion on June 5, 2019;
18 Plaintiff, HELIX ELECTRIC OF NEVADA, LLC ("Helix"), was represented by and through its
19 counsel, Cary B. Domina, Esq. and Ronald J. Cox, Esq. of the law firm of Peel Brimley LLP, and
20 Defendants, APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF
21 AMERICA ("Safeco"), were represented by and through their counsel, Randy Jefferies, Esq. of
22 Fennemore Craig; the Court having read and considered the pleadings filed by the parties; having
23 reviewed the evidence admitted during the trial; having heard and carefully considered the
24 testimony of the witnesses called to testify; having considered the oral and written arguments of
25 counsel, and with the intent of rendering a decision on all remaining claims before the Court,

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CLERK OF THE COURT

1 pursuant to NRCP 52(a) and 58;¹ the Court makes the following findings of fact and conclusions
2 of law:

3
4 FINDINGS OF FACT

5 1. In July 2011, APCO submitted a bid for the Craig Ranch Regional Park – Phase II
6 - Project No. 10294 (“Project”) to the City of North Las Vegas (“CNLV”). At that time, the
7 anticipated Project duration was approximately 550 calendar days.

8 2. Helix submitted a bid of approximately \$4,600,000 to APCO for the electrical
9 work required on the Project. Helix’s estimate assumed a Project duration of 550 days.

10 3. CNLV canceled the original solicitation and ultimately requested a second round
11 of bids in October 2011. Among other things, CNLV changed the duration of the Project from 18
12 months to 12 months.

13 4. On or about October 26, 2011, APCO submitted its second bid to CNLV for the
14 Project with a 12-month schedule.

15 5. CNLV issued its notice to proceed to APCO on January 11, 2012. APCO started
16 work on the Project on approximately January 16, 2012.

17 6. Helix mobilized its equipment and started work full time on or about February 20,
18 2012.

19 7. In the spring of 2012, APCO entered into a construction agreement (the “Prime
20 Contract”) with the CNLV in which APCO agreed to serve as the general contractor on the
21 Project.

22 8. Section 6.3.2 the General Conditions of the Prime Contract which are incorporated
23 into the Subcontract, states in part:

24
25
26
27 ¹ In the pretrial statement, the parties have stipulated that the Contract time was extended from January 2013
28 into November 2013 through no fault of either APCO or Helix.

1 [a]ll other claims notices for extra work shall be filed in writing to the Construction
2 Manager prior to the commencement of such work. Written notices shall use the words
3 "Notice of Potential Claim." Such Notice of Potential Claim shall state the circumstances
4 and all reasons for the claim, but need not state the amount.

5 9. After receiving the notice of proposed award, APCO agreed to contract terms with
6 Helix subject to certain specially negotiated terms modifying the form subcontract ("Helix
7 Addendum").

8 10. As part of the negotiation, APCO agreed to purchase certain materials totaling
9 \$2,248,248 as specified by Helix, which was to be removed from Helix's original proposed scope
10 and pricing.

11 11. Helix entered into an agreement with APCO to provide certain electrical related
12 labor, materials and equipment (the "Work") to the Project for the lump sum amount of
13 \$2,356,520.

14 12. On or about April 19, 2012, APCO and Helix entered into a formal subcontract for
15 the electrical work required on the Project (the "Subcontract").

16 13. Helix's Daily Reports, Certified Pay Roll Records and the Project Sign-in Sheets
17 establish that Helix started performing work for the Project as early as January 23, 2012, and
18 mobilized on the Project on or about February 28, 2012.

19 14. Pursuant to Exhibit "A" of the Subcontract, Helix was required to supply "all
20 labor, materials, tools, equipment, hoisting, forklift, supervision, management, permits and taxes
21 necessary to complete all of the scope of work" for the 'complete electrical package' for the
22 Project.
23

24 15. Section 6.5 contains a "no damage for delay" provision.

25
26 If Subcontractor shall be delayed in the performance of the Work by any act or neglect of
27 the Owner or Architect, or by agents or representatives of either, or by changes ordered in
28 the Work, or by fire, unavoidable casualties, national emergency, or by any cause other
that [SIC] the intentional Interference of Contractor, Subcontractor shall be entitled, as
Subcontractor's exclusive remedy, to an extension of time reasonably necessary to

1 compensate for the time lost due to the delay, but only if Subcontractor shall notify
2 Contractor in writing within twenty four (24) hours after such occurrences, and only if
3 Contractor shall be granted such time extension by Owner.

4 This clause was not modified by the Helix Addendum.

5 16. Section 6.7 of the Subcontract provided in pertinent part:

6 Contractor shall not be liable to Subcontractor for delays caused by reason of fire or other
7 casualty, or on account of riots, strikes, labor trouble, terrorism, acts of God, cataclysmic
8 event, or by reason of any other event or cause beyond Contractor's control, or
9 contributed to by Subcontractor.

10 Section 6.7 was not modified by the Helix Addendum.

11 17. The Parties Contract requires proof of actual cost increase. Section 7.1—which
12 was unchanged by the Helix Addendum—provides:

13 Contractor may order or direct changes, additions, deletions or other revisions in the
14 Subcontract work without invalidating the Subcontract. No changes, additions, deletions,
15 or other revisions to the Subcontract shall be valid unless made in writing. Subcontractor
16 markup shall be limited to that stated in the contract documents in addition to the
17 direct/actual on-site cost of the work, however, no profit and overhead markup on
18 overtime shall be allowed.

19 18. Section 7.2 as modified by the Helix Addendum, provided:

20 Subcontractor, prior to the commencement of such changed or revised work, shall submit,
21 (within 5 days of Contractor's written request) to Contractor, written copies of the
22 breakdown of cost or credit proposal, including work schedule revisions, for changes,
23 additions, deletions, or other revisions in a manner consistent with the Contract
24 Documents. Contractor shall not be liable to Subcontractor for a greater sum, or
25 additional time extensions, than Contractor obtains from Owner for such additional work.

26 19. The parties negotiated additional language that was included in Section 6 by the
27 Helix Addendum:

28 In the event the schedule as set forth above is changed by Contractor for whatever reason
so that Subcontractor either is precluded from performing the work in accordance with
said schedule and thereby suffers delay, or, is not allowed the number of calendar days to
perform the work under such modified schedule and must accelerate its performance, then
Subcontractor shall be entitled to receive from Contractor payment representing the costs
and damages sustained by Subcontractor for such delay or acceleration, providing said
costs and damages are first paid to Contractor.

20. Section 4.4 of the Subcontract—as amended by the Helix Addendum provides:

1 Progress payments will be made by Contractor to Subcontractor within 10 calendar days
2 after Contractor actually receives payment for Subcontractor's work from Owner. The
3 progress payment to Subcontractor shall be one hundred percent (100%) of the value of
4 Subcontract work completed (less 10% retention) during the preceding month as
5 determined by the Owner, less such other amounts as Contractor shall determine as being
6 properly withheld as allowed under this Article or as provided elsewhere in this
7 Subcontract. The estimates of Owner as to the amount of Work completed by
8 Subcontractor shall be binding upon Contractor and Subcontractor and shall conclusively
9 establish the amount of Work performed by Subcontractor. As a condition precedent to
10 receiving partial payments from Contractor for Work performed, Subcontractor shall
11 execute and deliver to Contractor, with its application for payment, a full and complete
12 release (Forms attached) of all claims and causes of action Subcontractor may have
13 against Contractor and Owner through the date of the execution of said release, save and
14 except those claims specifically listed on said release and described in a manner sufficient
15 for Contractor to identify such claim or claims with certainty. Upon the request of
16 Contractor, Subcontractor shall provide an Unconditional Waiver of Release in form
17 required by Contractor for any previous payment made to Subcontractor. Any payments
18 to Subcontractor shall be conditioned upon receipt of the actual payments by Contractor
19 from Owner. Subcontractor herein agrees to assume the same risk that the Owner may
20 become insolvent that Contractor has assumed by entering into the Prime Contract with
21 the Owner per NRS Statutes.

22 21. The Subcontract also incorporated the Prime Contract, which included the claim
23 procedures set forth in the Contract.

24 22. Helix assigned Kurk Williams as its Project Manager. Williams never signed in
25 using APCO's sign in sheets that were maintained at the Project site. By his own admission,
26 Williams' time devoted to the Project was not accurately tracked in Helix's certified payroll
27 reports, only Helix's job cost report.

28 23. Richard Clement was Helix's Project Superintendent. Clement was on site
occasionally and signed in with APCO at the Project twice during 2012.

24 24. Clement did not work on the Project between June 11, 2012 and September 26,
25 2012. Clement only worked two weeks on the Project from September 27, 2012 to October 7,
26 2012. Clement did not work on the Project from October 8, 2012 through January 20, 2013. In
27 all of 2013, which was the extended Project time, Clement only worked 32 hours during the week
28 ending January 27, 2013.

1 25. In late January 2013, Helix assigned Clement to another project and designated
2 Rainer Prietzel, Helix's Foreman to oversee work in the field, as the new Project Superintendent
3 and foreman.

4 26. According to the Labor Commissioner, and OSHA regulations, Helix must always
5 have a project superintendent on site at all times during the Project.
6

7 27. From January 2013 to May 2013, Helix typically had a three to five man crew on
8 the Project.

9 28. In early May 2013, with the exception of a few days, Prietzel was the only Helix
10 employee on the Project, and he split his time as the Project Superintendent and self-performing
11 contract and change order work on the Project.

12 29. Prietzel remained the Project Superintendent until the end of the Project in mid-
13 October 2013.
14

15 30. Helix's original line item for its general conditions, as reflected in its pay
16 application, was \$108,040 on a Subcontract price of \$2,380,085, which represents 4.5%.

17 31. The Project encountered significant delays and was not substantially completed
18 until October 25, 2013, thus resulting in Helix claiming approximately, \$138,000 in additional
19 extended overhead costs.

20 32. The project was never abandoned by CNLV.
21

22 33. Prior to the original project completion date passing, on January 9, 2013, APCO
23 submitted its first request for an extension of time to CNLV. APCO submitted its Time Impact
24 Analysis #1 ("TIA #1") to CNLV where it sought extended general conditions and home office
25 overhead of \$418,059 (\$266,229 for general conditions and \$151,830 for home office overhead).

26 34. Helix first notified APCO in writing that it would be asserting a claim for extended
27 overhead costs on January 28, 2013 and reserved its rights to submit a claim for "all additional
28

1 costs incurred due to scheduled delays for this project” (the “Claim”).

2 35. As of May 9, 2013, CNLV had not made a decision on APCO’s TIA #1.

3 36. On May 9, 2013, APCO submitted a revised Time Impact Analysis (“TIA #2”) to
4 CNLV seeking an additional five (5) months of compensation for general conditions and home
5 office overhead, among other claims, for a total delay claim of nine (9) months.
6

7 37. As part of TIA #2, APCO submitted Change Order Request No. 39.1 to CNLV
8 seeking compensation of \$752,499 for its extended general conditions and home office overhead
9 (\$479,205 for general conditions and \$273,294 for home office overhead).

10 38. This represented approximately seventy percent (70%) of APCO’s \$1,090,066.50
11 total claim against CNLV for the 9-month delay to the Project.
12

13 39. APCO’s claim did not include any amounts for its subcontractors, and APCO
14 acknowledges that as a company policy, it does not include its subcontractors’ claims with its
15 own claims.

16 40. Through no fault of APCO, Helix did not take delivery of various light poles and
17 related equipment until approximately January 30, 2013.

18 41. On June 19, 2013, APCO and Helix exchanged emails regarding various Project
19 issues, including Helix’s delay rates. APCO confirmed that if Helix submitted a request for
20 compensation that it would be forwarded to CNLV.
21

22 42. On June 19, 2013 Helix provided a supplemental notice of claim but did not
23 provide any back up to support its daily rates or the impacts alleged to be attributed to the delay.
24 At that time, Helix still only had Prietzel working on site.

25 43. On June 21, 2013 Helix and APCO exchanged emails related to the support for
26 Helix’s claimed costs, with APCO noting that a project manager was considered home office
27 overhead. Helix indicated that its job cost reports would reflect the actual costs for the extended
28

1 overhead.

2 44. In June 2013, Helix realized the Project was still several months away from being
3 completed. According to Helix's June 19 letter entitled "Extended overhead cost", Helix's cost
4 for extended overheard was \$640/day.

5 45. The \$640/day cost is comprised of (1) \$260 for the Project Manager; (2) \$280 for
6 the Superintendent; (3) \$25 for the site trailer; (4) \$5 for the Connex box; (5) \$25 for the forklift;
7 and (6) \$45 for the truck.

8 46. The email that accompanied Helix's June 19, 2013 letter advised APCO that to
9 date, Helix's Claim totaled \$72,960, but that Helix's Claim would increase for each day the
10 Project continued past the original completion date.

11 47. Also on June 19, 2013, APCO informed Helix, by way of an email, that it "is in
12 the process of presenting CNLV with a Time Impact Analysis containing facts as to why the
13 additional costs should be paid." APCO had submitted TIA #2 to CNLV on May 9, 2013, six
14 weeks prior to this email.

15 48. In the email, APCO further advised Helix that "[o]nce we fight the battle, and
16 hopefully come out successfully, this will open the door for Helix...to present their case for the
17 same."

18 49. While APCO notified Helix that it would forward to CNLV any letter Helix
19 provided regarding its claim for extended overhead costs, APCO did not inform Helix that it
20 needed Helix's Claim immediately so it could include it with APCO's claim to CNLV. Indeed,
21 according to APCO, it would first "fight that battle, and hopefully come out successfully..."
22 which would only then "open the door for Helix...to present their case..."

23 50. On August 27, 2013, despite the fact that the Project was still ongoing, Helix
24 furnished APCO with its first invoice for its Claim in the amount of \$102,400, which constituted
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1 32 weeks of extended overhead costs incurred between January 13, 2013, and August 30, 2013
2 (or 160 business days).

3 51. Helix's invoice identified an extended overhead cost of \$640/day for 32 weeks,
4 which had been provided to APCO in June 2013.

5 52. From May 6, 2013 through November 6, 2013, Prietzel was the only Helix person
6 on site. Prietzel confirmed that during that time period he was either working on completing
7 original Subcontract work for which Helix would be paid or change order work that was
8 acknowledged and paid by APCO and CNLV.

9 53. During construction, CNLV made changes or otherwise caused issues that
10 impacted Helix. In those instances, Helix submitted a request for additional compensation and
11 CNLV issued APCO change orders that compensated Helix for the related impacts. During the
12 extended Contract time, CNLV issued eleven change orders that resulted in additional
13 compensation to Helix through the Subcontract. Helix's pricing for the change orders included a
14 10% markup on materials and a 15% markup on labor to cover Helix's overhead.

15 54. APCO submitted Change Order Request No. 68 ("COR 68") to CNLV on
16 September 9, 2013, requesting compensation for Helix's Claim.

17 55. On September 16, 2013, CNLV rejected the COR 68 stating, "This COR is
18 REJECTED. The City of North Las Vegas does not have a contract with Helix Electric."

19 56. CNLV stated that it did not reject COR 68 for lack of backup or untimeliness.

20 57. The Construction Manager for CNLV during the Project, Joemel Llamado,
21 testified that the only reason he rejected Helix's Claim was because CNLV did not have a
22 contract with Helix. APCO should have included Helix's Claim in its own claim to CNLV since
23 Helix's Subcontract was with APCO, not CNLV.

24 58. Llamado did not look at the merits of the Claim because the Claim should have
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1 been included with APCO's claim.

2 59. APCO informed Helix that CNLV rejected COR 68 because of lack of backup
3 documentation.

4 60. On October 2, 2013, CNLV issued its decision on APCO's request for additional
5 time and compensation. CNLV determined that the time period from January 11, 2013 to May
6 10, 2013 was an excusable but not compensable delay. APCO was not charged liquidated
7 damages, but also was not provided compensation from January thru May 10, 2013. CNLV did
8 confirm that it would pay APCO \$560,724.16 for the delay from May 10, 2013 to October 25,
9 2013. APCO accepted that determination on or about October 10, 2013.

10 61. On October 3, 2013, APCO sent Helix a letter requesting additional back-up
11 documentation for the Claim so it could resubmit the Claim to CNLV.

12 62. That letter states in relevant part:

13
14 Attached is your invoice of August 27, 2013 in the amount of \$102,400. At this time
15 APCO has not received any back-up documentation to undo the previous formal rejection
16 made by the City of North Las Vegas. If you want APCO to re-submit your request,
17 please provide appropriate back-up for review.

18 63. On October 2, 2013, CNLV and APCO entered into a settlement agreement
19 through which CNLV agreed to pay APCO \$560,724.16 for its claim submitted under TIA #2,
20 including APCO's claim for added overhead and general conditions it incurred as a result of the
21 nine-month delay to the Project.

22 64. According to that settlement agreement, APCO agreed to "forgo any claims for
23 delays, disruptions, general conditions and overtime costs associated with the weekend work
24 previously performed...and for any other claim, present or future, that may occur on the project.

25 65. APCO did not notify Helix that it had entered into this settlement agreement.

26 66. Llamado's position was that the settlement agreement resolved any and all claims
27 between CNLV and APCO for the nine-month delay to the Project, including any claims APCO's
28

1 subcontractors might have.²

2 67. Pursuant to this settlement agreement, CNLV issued Change Order No. 50 to
3 APCO and agreed to pay APCO \$560,724.16 for the added overhead and general conditions it
4 incurred as a result of the extended project completion date.

5 68. On October 3, 2013, APCO transmitted to Helix CNLV's rejection of its invoice
6 for extended overhead.

7
8 69. Near the end of the Project in October 2013, Pelan, notified Helix, that Helix could
9 not include the Claim for extended overhead in Helix's pay application for retention because
10 CNLV would not release the retention on the Project if there were outstanding Claims on the
11 Project.

12 70. In compliance with Pelan's instructions, on October 18, 2013, Helix submitted its
13 Pay Application for Retention only in the amount of \$105,677.01 and identified it as Pay
14 Application No. 161113-002 (the "Retention Pay App").

15
16 71. On October 18, 2013, Helix submitted its pay application for the time period up
17 through October 30, 2013. At that time, Helix billed its general conditions line item at 100%.

18 72. On October 18, 2013, Helix submitted its pay application for the release of
19 retention. As with prior pay applications, Helix enclosed a conditional waiver. The release was
20 conditioned on APCO issuing a final payment in the amount of \$105,677.01 and expressly
21 confirmed that there were "zero" claims outstanding. Helix signed and provided that release to
22 APCO after receiving CNLV's rejection of its extended overhead invoice.

23
24 73. Helix also provided to APCO a "Conditional Waiver and Release Upon Final
25 Payment" (the "Conditional Waiver") for the Retention Pay App only (i.e. Pay App No. 161113-

26
27 ² Joe Pelan, the Contract Manager for APCO, disagreed with this position, but APCO and Helix did not test it
28 through the claims process provided in the Prime Contract.

1 002).

2 74. Helix indicated in the Conditional Waiver that there was no "Disputed Claim
3 Amount" relating to the Retention Pay App.

4 75. Helix takes the position that the Conditional Waiver was not intended to release
5 Helix's Claim.

6 76. The evidence presented at trial of the circumstances surrounding the execution of
7 the Conditional Waiver do not support Helix's waiver of the Claim.

8 77. It took APCO more than a year to pay Helix for its Retention Pay App, during
9 which time, Helix made it clear to APCO that it would continue pursuing its Claim.

10 78. Between October 2013 and the end of October 2014 when APCO finally paid
11 Helix its retention, APCO forwarded Helix's Claim to CNLV on two separate occasions and
12 received multiple written notices from Helix that it maintained its Claim against APCO.

13 79. The project was substantially completed on October 25, 2013.

14 80. On October 31, 2013, in order to account for certain overhead items that were
15 omitted from the original Claim, Helix: (i) increased its Claim from \$102,400 to \$111,847; (ii)
16 resubmitted its Invoice to APCO; and (iii) provided additional backup information and
17 documents. Included with the revised invoice was a monthly breakdown of Helix's Claim from
18 January to August, which included the following categories of damages: (1) Project Manager; (2)
19 Project Engineer; (3) Superintendent; (4) Site trucks; (5) Project Fuel; (6) Site Trailer; (7) Wire
20 Trailer; (8) Office supplies; (9) Storage Connex boxes; (10) forklifts; (11) small tools; and (12)
21 consumables. According to the summary of the Claim, Helix charged the Project 4-hours a day
22 for its Project Manager, Kurk Williams at \$65/hour, and 4-hours a day for its Superintendent, Ray
23 Prietzel at \$70/day.

24 81. On or about November 5, 2013, three weeks after APCO received Helix's
25
26
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28

1 Retention Pay App and Conditional Waiver, APCO submitted a revised COR 68 (68.1) to CNLV
2 seeking a total of \$111,847 for Helix's Claim.

3 82. Had APCO believed Helix's Conditional Waiver for the Retention Pay App
4 (received on October 18, 2013) waived any and all claims Helix had on the Project, including its
5 Claim for extended overhead, APCO would not have submitted revised COR 68.1 to CNLV three
6 weeks after receiving Helix's Conditional Waiver.
7

8 83. On November 18, 2013, CNLV again rejected the Change Order Request stating,
9 "This is the 2nd COR for Helix Electric's extended overhead submittal. The 1st one was submitted
10 on Sept. 9, 2013 and Rejected on Sept. 16, 2013. This submittal dated Nov. 5, 2013 is
11 REJECTED on Nov. 13, 2013."

12 84. Llamado's second rejection had nothing to do with lack of backup documents or
13 untimeliness and was rejected simply because APCO should have included Helix's Claim under
14 its own claim to CNLV.
15

16 85. By this time, APCO had already settled with CNLV to receive payment for its own
17 extended overhead costs, and in doing so, waived and released any further claims against CNLV,
18 including Helix's Claim.
19

20 86. As Helix had previously informed APCO it would, on or about November 13,
21 2013, Helix submitted to APCO another invoice including backup in the amount of \$26,304
22 accounting for the extended overhead costs for September and October ("COR 93").

23 87. APCO confirmed to Helix's Kurk Williams that there would be no APCO
24 approval unless and until CNLV approved Helix's request.

25 88. CNLV rejected COR 93.

26 89. By submitting COR 93 to CNLV on November 13, 2013, APCO once again
27 acknowledged that it knew Helix's Conditional Waiver submitted on October 18, 2013 related to
28

1 the Retention Pay App only, and did not waive Helix's Claim for extended overhead.

2 90. If APCO believed the Conditional Waiver released Helix's Claim, APCO would
3 not have continued to submit Helix's Claim to CNLV.

4 91. On January 28, 2014, APCO sent Helix's Victor Fuchs and Bob Johnson an email
5 confirming that he was meeting with CNLV to discuss the remaining change order issues on
6 February 4, 2014. Pelan testified that, CNLV advised APCO that it was rejecting Helix's claim
7 because it had no merit and Helix only had one person on the Project while completing Helix's
8 contract work in 2013. Pelan reported CNLV's position to Helix.³

9 92. The Subcontract incorporated APCO's prime contract with CNLV in Section 1.1,
10 which sets forth CNLV's claims procedure for requests for payment that are escalated to claims.
11 Helix did not request that APCO initiate these proceedings on its behalf regarding the claim for
12 extended overhead.

13 93. On March 31, 2014, CNLV and APCO agreed that there would be no further
14 COR's submitted on the Project.

15 94. On April 16, 2014, Helix's Victor Fuchs threatened to convert the outstanding
16 issues into a claim if Helix's retention was not released per its pay application and release that
17 were submitted on October 18, 2013.

18 95. APCO admitted that on June 10, 2014, it received final retention from CNLV.

19 96. However, because APCO had not paid Helix its Retention or its Claim, Helix sent
20 APCO another demand for payment on September 26, 2014, seeking payment for both its
21 Retention and the Claim.

22 97. CNLV issued the formal notice of completion of the project on July 8, 2014.

23 ³ While the Court finds Pelan's testimony on this issue credible, the testimony of Llamado
24 differs.
25
26
27
28

1 98. On October 21, 2014, APCO issued check number 1473 in the amount of
2 \$105,679, which represented final payment of Helix's retention, in accordance with the October
3 18, 2013 retention billing and related final release.⁴

4 99. On October 29, 2014, APCO sent Helix an email requesting that it sign a new
5 Conditional Waiver and Release Upon Final Payment which included Helix's Retention only, but
6 did not include any disputed amount for the Claim.
7

8 100. Attached to that email was a copy of the Retention Check APCO informed Helix it
9 could pickup once it received the new executed Conditional Release.

10 101. Upon receiving the new Conditional Waiver and before picking up the Retention
11 Check, Helix notified APCO that it was not going to sign the new Conditional Waiver without
12 reserving a right to its Claim.
13

14 102. APCO invited Helix to revise the new Conditional Waiver as it saw fit, and Helix
15 provided an unsigned copy of it seeking full payment of the Claim and the Retention for a total
16 amount of \$243,830.

17 103. APCO declined to pay the Claim, and after additional discussions between Helix
18 and APCO, it was decided that Helix would exchange for the Retention Check an Unconditional
19 Waiver and Release Upon Final Payment seeking payment of \$105,679 for Retention, and
20 reserving as its Disputed Claim, \$138,151.
21

22 104. As part of the "Disputed Claim" field, Helix referenced additional correspondence
23 which it had incorporated into the Unconditional Waiver and Release.

24 105. Helix included a letter dated October 30, 2014 clarifying that while it was
25 demanding its retention payment, it was also seeking payment for its Claim in the amount of
26

27 ⁴ Because of this lengthy delay in payment, Helix is entitled to interest on the retention amount under NRS
28 338.

1 \$138,151 for which it also provided a final invoice.

2 106. In one such email, Helix writes, "Joe, please accept this email as a 30 day
3 extension of time for the execution of [the] promissory note attached...In good faith we [are]
4 extending this time per your request, so you can come up with an arrangement to repay the
5 outstanding amount that is past due."

6
7 107. APCO never executed the Promissory Note or paid Helix its Claim.

8 108. On October 29, 2014, APCO tendered the check and another signed release for
9 final payment. That release mirrored the one that Helix submitted in October 2013.

10 109. On October 29, 2014, Helix's Victor Fuchs sent an email to Pelan stating: "this is
11 not going to work." Pelan responded that same day stating: "Victor, make changes for me to
12 approve. Thanks."

13
14 110. On October 18, 2013, the Senior Vice President of Helix, Robert D. Johnson,
15 signed a "Conditional Waiver and Release Upon Final Payment".

16 111. Helix received the funds on October 29, 2014.

17 112. On October 30, 2014, the day after negotiating the final payment check, Helix
18 tendered a signed final lien release that purported to reserve Helix's extended overhead invoices
19 in the amount of \$138,151.

20
21 113. Helix has established how certain of its costs increased due to the extended time
22 on the Project given its demobilization and reduction in crew size. Prietzel was the only person
23 on site after May 6, 2013 and he was completing base Subcontract work and change order work
24 that was paid by CNLV.

25 114. After weighing the testimony of the witnesses and a review of the admitted
26 documents, the Court finds, that the delay was not so unreasonable to amount to abandonment
27
28

1 and that therefore the provision limiting damages after a delay does not permit the recovery of
2 extended general conditions.

3 115. Since CNLV determined that the delays through May 13, 2013 were not
4 compensable, the only time period that APCO recovered payment for its delay costs was May 13,
5 2013 through October 13, 2013. During that same compensable time period, Helix's reasonable
6 costs totaled \$43,992.39.⁵ Although Helix was earning revenue and being paid during the time
7 period for the Work and certain approved change orders, APCO by its settlement with CNLV,
8 impaired Helix's ability to pursue the Claim.
9

10 116. Helix has supported its claim for certain additional costs. As Prietzel was paid for
11 his time on site under the approved change orders the claimed expense for acting as a
12 superintendent (supervising only himself) is not appropriate.
13

14 117. After weighing the testimony of the witnesses and a review of the admitted
15 documents, the Court finds, Helix has established that it suffered damages as a result of the delay
16 in project completion in the amount of \$43,992.39.

17 118. If any findings of fact are properly conclusions of law, they shall be treated as if
18 appropriately identified and designated.
19

20 CONCLUSIONS OF LAW

- 21 1. The Subcontract was a valid contract between Helix and APCO.

22
23 ⁵ The Court has utilized the summary used as D5 during the trial with the deletion of the line item
"Superintendent". Those totals for the compensable months with that modification are:

24 May 13	\$8501.05
25 June 13	\$7124.90
26 July 13	\$8270.69
27 August 13	\$6785.04
28 September 13	\$6170.56
October 13	\$7140.15
TOTAL	\$43992.39

1 2. The Court finds that the Conditional Waiver Helix submitted to APCO on or about
2 October 2013 did not constitute a waiver of Helix's Claim.

3 3. APCO's own conduct establishes that it knew Helix was not waiving its Claim as
4 it continued to submit Helix's Claim to CNLV after receiving the Conditional Waiver.

5 4. Helix provided sufficient evidence establishing that it incurred damages as a result
6 of the Project schedule extending nine months past its original completion date.

7 5. APCO had a duty to include Helix's Claim in its own claim to CNLV or otherwise
8 preserve the Claim when it settled, which it failed to do.

9 6. APCO's internal policy and decision to keep Helix's Claim separate from its own
10 claim impaired Helix's ability to pursue the Claim.

11 7. When APCO entered into the settlement agreement with CNLV on October 3,
12 2013 without Helix's knowledge, CNLV took the position that APCO waived and released any
13 and all claims arising from the nine month Project delay, including Helix's Claim.

14 8. In every contract, there is an implied covenant of good faith and fair dealing.

15 9. APCO's impairment of Helix's Claim constitutes a breach of the covenant of good
16 faith and fair dealing implied in the Subcontract.

17 10. APCO breached the covenant of good faith and fair dealing when it, without
18 notifying Helix, settled its claim with CNLV for extended general conditions, impairing Helix
19 from pursuing any pass-through claims to CNLV for its Claim, but continued to submit Helix's
20 Claim to CNLV knowing that CNLV rejected it because it had no contractual privity with Helix,
21 and now APCO had released any and all claims against CNLV.

22 11. Helix is entitled to judgment against APCO under its claim for Breach of Implied
23 Covenant of Good Faith and Fair Dealing and its damages are the damages it has established for
24

1 in the amount of \$43,992.39.⁶

2 12. Because the Project was a public works project, it was governed under NRS
3 Chapter 338.

4 13. Under NRS 338.490, a conditional waiver and release can only release payments
5 for work which is the subject of the payment application to which the wavier and release
6 corresponds.
7

8 14. The Conditional Waiver Helix provided APCO on October 18, 2013, was for
9 retention only and expressly referred to the Retention Pay App (Pay Application No. 161113-022)
10 which sought retention only.

11 15. The Retention Pay App did not include Helix's Claim.

12 16. Therefore, because by statute, the Conditional Waiver can only release work that is
13 the subject of the Retention Pay App, it did not constitute a waiver and release of Helix's Claim.
14

15 17. NRS 338.565 states in relevant part:

16 If a contractor makes payment to a subcontractor or supplier more
17 than 10 days after the occurrence of any of the following acts or
18 omissions: (a) the contractor fails to pay his or her subcontractor or
19 supplier in accordance with the provisions of subsection 1 of NRS
20 338.550...the contractor shall pay to the subcontractor or supplier,
21 in addition to the entire amount of the progress bill or the retainage
22 bill or any portion thereof, interest from the 10th day on the amount
23 delayed, at a rate equal to the lowest daily prime rate...plus 2
24 percent, until payment is made to the subcontractor or supplier.

25 18. NRS 338.550(1) required APCO to pay Helix its retention within 10 days of
26 receiving its retention payment from CNLV.
27

28 ⁶ The Court has not awarded separate damages for the breach of contract claim as those would be duplicative of this award.

1 19. APCO admits it received its retention payment from CNLV on June 10, 2014, yet
2 it did not pay Helix its retention until October 30, 2014, more than four months later and in
3 violation of NRS 338.550(1).

4 20. APCO was required to pay Helix its retention amount of \$105,677.01, in addition
5 to interest at the rate of prime plus 2 percent from June 10, 2014 through October 30, 2014.
6 APCO failed to do so.

7 21. After providing APCO with the Conditional Waiver, Helix incurred additional
8 damages that could not be waived by way of the Conditional Waiver (i.e. the interest on its
9 wrongfully withheld retention).

10 22. On June 10, 2014, APCO received final retention from CNLV.

11 23. APCO failed to pay Helix its retention in the amount of \$105,679 until October 29,
12 2014.

13 24. Pursuant to NRS 338.550(1), APCO was required to pay Helix its retention no
14 later than June 21, 2014.

15 25. As a result of APCO's failure, and pursuant to NRS 338.565(1), APCO is required
16 to pay Helix interest on \$105,677.01 from June 22, 2014 through October 28, 2014, at a rate of
17 5.25% for a total of \$1,960.85.

18 26. Even if the pay-if-paid clause was enforceable, APCO cannot rely upon it to shield
19 itself from liability to Helix when its decision to submit Helix's Claim separately from its claim
20 led to CNLV rejecting Helix's Claim, and APCO's settlement with CNLV forever barred APCO
21 from receiving payment from CNLV for Helix's Claim.

22 27. To the extent the delays were caused by CNLV, APCO is still liable to Helix since
23 it impaired those claims in contradiction to NRS 624.628(3)(c) by entering into a settlement
24 agreement with CNLV on October 2, 2013.

1 28. Because this Court has found APCO breached the Subcontract and breached the
2 covenant of good faith and fair dealing, Helix is entitled to judgment against Safeco and the
3 Payment Bond as well.

4 29. NRS 339.025(1)(b) provides the following:

5
6 1. Before any contract,..., exceeding \$100,000 for any project
7 for the new construction, repair or reconstruction of any public
8 building or other public work or public improvement of any
9 contracting body is awarded to any contractor, the contractor shall
furnish to the contracting body the following bonds which become
binding upon the award of the contract to the contractor;

10 a.

11 b. A payment bond in an amount to be fixed by the
12 contracting body, but not less than 50 percent of the contract
13 amount, conditioned upon the faithful performance of the
14 contract in accordance with the plans, specifications and
15 conditions of the contract. The bond must be solely for the
protection of claimants supplying labor or materials to the
contractor to whom the contract was awarded, or to any of his
or her subcontractors, in the prosecution of the work provided
for in such contract.

16 30. NRS 339.035(1) provides:

17 ...any claimant who has performed labor or furnished material in
18 the prosecution of the work provided for in any contract for which
19 a payment bond has been given pursuant to the provisions of
20 subsection 1 of NRS 339.025, and who has not been paid in full
21 before the expiration of 90 days after the date on which the
22 claimant performed the last of such labor or furnished the last of
23 such materials for which the claimant claims payment, may bring
an action on such payment bond in his or her own name to recover
any amount due the claimant for such labor or material, and may
prosecute such action to final judgment and have execution on the
judgment.

24 31. SAFECO issued a Labor and Material Payment Bond, Bond No. 024043470,
25 wherein APCO is the principal and SAFECO is the surety.

26 32. Helix provided Work to the Project and remains unpaid for the same.

27 33. Therefore, Helix is a claimant against the Bond and may execute a judgment
28

1 against the same.

2 34. Section 20.5 of the Subcontract provides that “ [i]n the event either party employs
3 an attorney to institute a lawsuit or to demand arbitration for any cause arising out of the
4 Subcontract Work or the Subcontract, or any of the Contract Documents, the prevailing party
5 shall be entitled to all costs, attorney’s fees and any other reasonable expenses incurred therein.”
6

7 35. This provision was not modified by the Helix Addendum.

8 36. The Court finds that Helix is the prevailing party and is entitled to an award of its
9 attorneys’ fees and costs.

10 37. If any conclusions of law are properly findings of fact, they shall be treated as if
11 appropriately identified and designated.

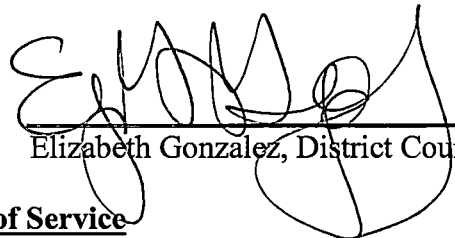
12 Based upon the foregoing Findings of Fact and Conclusions of Law **IT IS HEREBY**
13 **ORDERED, ADJUDGED AND DECREED** as follows:
14

- 15 1. **IT IS HEREBY ORDERED** that, as to Plaintiff’s Claim for Breach of Contract
16 against APCO, this Court finds in favor of Plaintiff but as the Claim was impaired
17 awards damages under the Breach of the Implied Covenant of Good Faith and
18 Fair Dealing, rather than awarding duplicative damages;
- 19 2. **IT IS FURTHER ORDERED** that, as to Plaintiff’s Claim for Breach of the
20 Implied Covenant of Good Faith and Fair Dealing against APCO, this Court finds
21 in favor of Plaintiff and awards damages in the amount of \$43,992.39 together
22 with interest as provided by law and taxable costs of suit;
- 23 3. **IT IS FURTHER ORDERED** that, as to Plaintiff’s Claim for violations of NRS
24 338 against APCO, this Court finds in favor of Plaintiff in the amount of
25 \$1,960.85;⁷
26
27

28 ⁷ These damages are in addition to those awarded under the claim of Breach of the Implied Covenant of Good

- 1 4. **IT IS FURTHER ORDERED** that, given the Court's findings against APCO,
2 the Court finds in favor of Plaintiff and against Safeco and the Bond;
3 5. **IT IS FURTHER ORDERED** that this Court will address any issues of
4 attorneys' fees through motions that may be filed with the Court.
5 6. Any claim not otherwise disposed of by this decision is dismissed.
6

7 DATED this 8th day of July, 2019.
8

9 
10 Elizabeth Gonzalez, District Court Judge
11

12 **Certificate of Service**

13 I hereby certify that on the date filed, a copy of the foregoing Scheduling Order and
14 Order Setting Civil Jury Trial, Pre-Trial and Calendar Call was electronically served, pursuant to
15 N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing
16 Program.
17

18 
19 Dan Kutinac
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Faith and Fair Dealing.

EXHIBIT B

HELIX BILLED AMOUNTS FOR GENERAL CONDITIONS VS COMPARISON TO HELIX PARTIAL JOB COST

	January 13 Helix Bill	Actual Costs from Helix Jan 13 Job Cost	February 13 Helix Bill	Actual Costs from Helix Feb 13 Job Cost	March 13 Helix Bill	Actual Costs from Helix Mar 13 Job Cost	April 13 Helix Bill	Actual Costs from Helix Apr 13 Job Cost	May 13 Helix Bill	Actual Costs from Helix May 13 Job Cost
Project Manager	2,600.00	4,663.71	5,200.00	2,930.51	5,200.00	705.54	5,200.00	651.28	6,500.00	651.28
Project Engineer		85.24	901.90		901.90		901.90	418.91	901.90	
Superintendent	2,800.00		5,600.00		5,600.00		5,600.00		7,000.00	
Site Truck (s)	302.50		505.00		440.00		440.00		165.00	
Project Fuel	457.14		1,239.11	831.15	680.66	1,126.46	603.70	618.78	256.19	548.82
Site Trailer	110.00		220.00		220.00		220.00		220.00	
Wire Trailer (s)	55.00		110.00		110.00		110.00		55.00	
Storage Conex (s)	110.00		220.00		110.00		110.00		110.00	
Forklifts			3,329.48	3,026.80	3,426.32	3,114.85				
Bob Johnson Removed Forklift for March 2013 in His Email to Joe Pelan										
					(3,426.32)	(3,114.85)				
Small Tools	379.02	630.55	655.09	644.44	501.40	597.63	414.16	376.51	292.96	216.38
Rainer Prietzel Stated Sm Tools off Project 6/30/13 in His Deposition										
Total	6,813.66	5,379.50	17,980.58	7,432.90	13,763.96	2,429.63	13,599.76	2,065.48	15,501.05	1,416.48

	June 13 Helix Bill	Actual Costs from Helix June 13 Job Cost	July 13 Helix Bill	Actual Costs from Helix July 13 Job Cost	Aug 13 Helix Bill	Actual Costs from Helix Aug 13 Job Cost	Sept 13 Helix Bill	Actual Costs from Helix Sept 13 Job Cost	Oct 13 Helix Bill	Actual Costs from Helix Oct 13 Job Cost	Total Helix Bill	Actual Total Costs from Helix Job Cost
Project Manager	5,200.00	4,829.98	6,500.00	4,992.72	5,200.00	1,845.11	5,200.00	1,410.95	6,500.00	1,242.71	53,300.00	23,923.79
Project Engineer	901.90		901.90	1,430.46	901.90	2,875.03	512.12	828.10	640.15	219.45	7,465.57	5,857.19
Superintendent	5,600.00		7,000.00		5,600.00		5,600.00		7,000.00		57,400.00	-
Site Truck (s)	165.00		165.00		165.00		165.00				2,512.50	-
Project Fuel	353.32	232.90	373.79	321.20	298.14	339.81	293.44	272.04		268.76	4,555.49	4,559.92
Site Trailer	220.00		220.00		220.00						1,650.00	-
Wire Trailer (s)	110.00										550.00	-
Storage Conex (s)	174.77		110.00								944.77	-
Forklifts											6,755.80	6,141.65
Bob Johnson Removed Forklift for March 2013												
											(3,426.32)	(3,114.85)
Small Tools		208.83	214.52	155.30	166.83	151.66	174.77	198.62	218.52	158.93	3,017.27	3,338.85
Rainer Prietzel Stated Sm Tools off Project 6/30/13												
			(214.52)	(155.30)	(166.83)	(151.66)	(174.77)	(198.62)	(218.52)	(158.93)	(774.64)	(864.51)
Total	12,724.99	5,271.71	15,270.69	6,744.38	12,385.04	5,059.95	11,770.56	2,511.09	14,140.15	1,730.92	133,950.44	40,042.04

Actual Costs on Job Cost Reports Less Credit for Forklift & Small Tools	40,042.04
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Helix Claimed Costs for 10 Months of GC's as Given	40,042.04
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APCO001318



EXHIBIT C

HELIX BILLED AMOUNTS FOR GENERAL CONDITIONS VS COMPARISON TO HELIX PARTIAL JOB COST

	January 13 Helix Bill	Actual Costs from Helix Jan 13 Job Cost	Bates #	February 13 Helix Bill	Actual Costs from Helix Feb 13 Job Cost	Bates #	March 13 Helix Bill	Actual Costs from Helix Mar 13 Job Cost	Bates #	April 13 Helix Bill	Actual Costs from Helix Apr 13 Job Cost	Bates #	May 13 Helix Bill	Actual Costs from Helix May 13 Job Cost	Bates #
Project Manager	2,600.00	4,663.71	HE1000020-21	5,200.00	2,990.51	HE1000031-32	5,200.00	705.54	HE1000042	5,200.00	651.28	HE1000059	6,500.00	651.28	HE1000066-67
Project Engineer		85.24	HE1000018-19	901.90			901.90			901.90	418.91	HE1000057	901.90		
Superintendent	2,800.00			5,600.00			5,600.00			5,600.00			7,000.00		
Site Truck (s)	302.50			505.00						440.00			165.00		
Project Fuel	457.14			1,239.11	831.15	HE1000031	680.66	1,126.46	HE1000041-42	603.70	618.78	HE1000058	256.19	548.82	HE1000066
Site Trailer	110.00			220.00			220.00			220.00			220.00		
Wire Trailer (s)	55.00			110.00			110.00			110.00			55.00		
Storage Conex (s)	110.00			220.00			110.00			110.00			110.00		
Forklifts				3,329.48	3,026.80	HE1000031	3,426.32	3,114.85	HE1000041						
Bob Johnson Removed Forklift for March 2013 in His 01/29/16 Email to Joe Peilan APC00010881															
Small Tools	379.02	630.55	HE1000019	655.09	644.44	HE1000029-30	501.40	597.63	HE1000040-41	414.16	376.51	HE1000057-58	292.96	216.38	HE1000065
Rainer Priezel Stated Sm Tools off Project 6/20/13 in His Deposition (Depo Pg 87 & Helix Daily Report APC0001049)															
Total	6,813.66	5,379.50		17,980.58	7,432.90		13,763.96	2,429.63		13,599.76	2,065.48		15,501.05	1,416.48	

	June 13 Helix Bill	Actual Costs from Helix June 13 Job Cost	Bates #	July 13 Helix Bill	Actual Costs from Helix July 13 Job Cost	Bates #	Aug 13 Helix Bill	Actual Costs from Helix Aug 13 Job Cost	Bates #	Sept 13 Helix Bill	Actual Costs from Helix Sept 13 Job Cost	Bates #	Oct 13 Helix Bill	Actual Costs from Helix Oct 13 Job Cost	Bates #	Total Helix Bill	Actual Total Costs from Helix Job Cost
Project Manager	5,200.00	4,829.98	HE1000073-74	6,500.00	4,992.72	HE1000081	5,200.00	1,845.11	HE1000088	5,200.00	1,410.95	HE1000095	6,500.00	1,242.71	HE1000100	53,300.00	23,923.79
Project Engineer	901.90			901.90	1,430.46	HE1000079	901.90	2,875.03	HE1000086	5,121.12	828.10	HE1000092-93	640.15	219.45	HE1000098	7,465.57	5,857.19
Superintendent	5,600.00			7,000.00			5,600.00			5,600.00			7,000.00			57,400.00	-
Site Truck (s)	165.00			165.00			165.00			165.00						2,512.50	-
Project Fuel	353.32	232.90	HE1000073	373.79	321.20	HE1000080	298.14	339.81	HE1000087	293.44	272.04	HE1000094		268.76	HE1000099	4,555.49	4,559.92
Site Trailer	220.00			220.00			220.00									1,650.00	-
Wire Trailer (s)	110.00															550.00	-
Storage Conex (s)	110.00			110.00												944.77	-
Forklifts																6,755.80	6,141.65
Bob Johnson Removed Forklift for March 2013 in His 01/29/16 Email																3,426.32	3,114.85
Small Tools		208.83	HE1000072	214.52	155.30	HE1000079-80	166.83	151.66	HE1000086-87	174.77	198.62	HE1000093	218.52	158.93	HE1000098-99	3,017.27	3,338.85
Rainer Priezel Stated Sm Tools off Project 6/20/13																(774.64)	(664.51)
Total	12,724.99	5,271.71		15,270.69	6,744.38		12,385.04	5,059.95		11,770.56	2,511.09		14,140.15	1,730.92		133,950.44	40,042.04

Actual Costs on Job Cost Reports Less Credit for Forklift & Small Tools

40,042.04

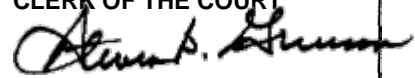
Helix Claimed Costs for 10 Months of GC's as Given

40,042.04

13

Exhibit 5

Exhibit 5



1 **OPPC**
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3 Nevada Bar No. 10567
4 RONALD J. COX, ESQ.
5 Nevada Bar No. 12723
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10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 HELIX ELECTRIC OF NEVADA, LLC, a
13 Nevada limited liability company,

14 Plaintiff,

15 vs.

16 APCO CONSTRUCTION, a Nevada corporation;
17 SAFECO INSURANCE COMPANY OF
18 AMERICA; DOES I through X; and BOE
19 BONDING COMPANIES I through X,

20 Defendants.

CASE NO. : A-16-730091-B
DEPT. NO. : XI

**HELIX ELECTRIC OF NEVADA,
LLC'S:**

- (I) **OPPOSITION TO APCO
CONSTRUCTION, INC.'S
AND SAFE INSURANCE
COMPANY OF
AMERICA'S MOTION
FOR CLARIFICATION
AND/OR AMENDMENT
TO FINDINGS OF FACT
AND CONCLUSIONS OF
LAW; AND**
- (II) **COUNTERMOTION FOR
AMENDMENT TO
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

21
22
23
24
25 Plaintiff, HELIX ELECTRIC OF NEVADA, LLC ("Helix") by and through its attorneys,
26 the law firm of Peel Brimley, hereby submits its (i) Opposition to Defendants APCO
27 CONSTRUCTION'S ("APCO") and SAFECO INSURANCE COMPANY OF AMERICA'S
28 ("Safeco") Motion for Clarification and/or Amendment to Findings of Fact and Conclusions of

PEEL BRIMLEY LLP
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1 Law (the "Motion"); and (ii) Countermotion for Amendment to Findings of Fact and Conclusions
2 of Law.

3 This Opposition and Countermotion are made and based on the following Memorandum of
4 Points and Authorities, the pleadings, exhibits, and papers on file herein, and any argument that the
5 Court entertains on this matter.

6 Dated this 29th day of July, 2019.

8 **PEEL BRIMLEY LLP**

9 
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

APCO's Motion is based largely upon what Helix believes is a typographical error in the Court's Findings of Fact and Conclusions of Law as well as several incorrect representations of this Court's findings at trial. APCO also argues that Helix is entitled to no damages, due to the no damage for delay clause which the Court found was enforceable. Helix, however, is entitled to damages despite the existence of the no damage for delay provision in the contract because NRS 338.485(2)(c)(4) renders such a provision void if the public body significantly extends the duration of the public work, which is exactly what the City of North Las Vegas ("CNLV") did here. In addition, Helix is entitled to damages due to APCO's breach of the covenant of good faith and fair dealing when it settled all claims for overhead costs directly with CNLV, thus barring Helix from pursuing its claim. Helix is also entitled to recover its costs incurred for Kirk Williams' time on the Project as Mr. Williams' testimony at trial established that the job cost reports did not accurately represent his time on the Project and he testified, credibly, to the amount of time he spent working on the Project throughout its duration. APCO attempts to support its arguments by stating that the Court rejected Mr. Williams' testimony and Helix's billings. However, these assertions are completely unsupported by the record and provide no basis upon which this Court should grant the Motion. As a result, APCO's Motion must be denied.¹

II. LEGAL ARGUMENTS

A. Helix is Entitled to Damages Because (i) NRS 338.485(2)(c)(4) Renders No Damage for Delay Clauses Void when a Public Entity Significantly Increases the Duration of a Public Work; and (ii) APCO Breached of the Covenant of Good Faith and Fair Dealing, Preventing Helix from Pursuing its Claim

When ruling on the applicability of the no damages for delay provision in the Agreement, the Court found that the "delay was not so unreasonable to amount to abandonment," thereby not triggering the exception within NRS 338.485(2)(c)(1). The Court did not, however, address the other, stronger, argument raised by Helix (and included in its Proposed Findings of Fact and

¹ To avoid potential confusion, while not appearing in the following order in this Opposition, true and correct copies of the excerpts of the Trial Transcripts cited herein have been attached to this Opposition and Countermotion as follows: Day One is attached as **Exhibit 1**; Day Two is attached as **Exhibit 2**; and Day Three is attached as **Exhibit 3**.

1 Conclusions of Law) that NRS 338.485(2)(c)(4) also applied and renders the no damage for delay
2 provision of the Agreement void and unenforceable.

3 NRS 338.485(2)(c)(4) states that a clause that acts to waive, release or extinguish a claim
4 or right for damages that the contractor may otherwise possess or acquire as a result of a delay that
5 is “[c]aused by a decision by the public body to significantly add to the scope or duration of the
6 public work” is against public policy and is void and unenforceable. This argument was raised by
7 Helix at trial and included in its Proposed Findings of Fact and Conclusions of Law, but only
8 Helix’s alternative argument regarding abandonment was addressed by the Court.²

9 The Project’s duration was scheduled for 12 months yet, after numerous delays and changes
10 made by CNLV, the Project took approximately 21 months to complete. Nearly doubling the
11 duration of the Project is certainly a “significant” addition to the duration of the public work. At
12 trial, Joemel Llamado, the construction manager for CNLV during the Project, testified that CNLV
13 granted APCO an extension of time of 180 non-compensatory days and 165 compensatory days.³
14 In his testimony, Mr. Llamado stated (i) CNLV made the ultimate decision to extend the duration
15 of the Project; and (ii) he believed that an extension of 180 days to the Project originally scheduled
16 to last one year was a significant addition to the duration of the Project.⁴ In reality, the Project was
17 actually delayed approximately 287 days. Furthermore, this Court also acknowledged that CNLV
18 made numerous changes to the Project throughout its duration in its FFCL and that these changes
19 impacted the parties.⁵ As a result, while CNLV may not have abandoned the Project, it certainly
20 significantly added to the duration of the public work, triggering NRS 338.485(2)(c)(4) and
21 rendering the no damage for delay clause void and unenforceable. Accordingly, the Court’s award
22 of damages to Helix for its extended general conditions is proper.

23 Furthermore, APCO ignores the fact that the Court did not award Helix damages under its
24 breach of contract claim, but rather under Helix’s claim for the breach of the implied covenant of
25 good faith and fair dealing. The Court rightfully found that APCO could not actively prevent Helix
26

27 ² See FFCL, at ¶ 114; **Exhibit 3**, 110:1-7.

28 ³ **Exhibit 1**, 141:4 – 144:9.

⁴ *Id.*, 141:14 – 142:19.

⁵ See FFCL, at ¶ 53.

1 from recovering monies from CNLV for its extended general conditions by acting in bad faith and
2 then bar Helix's claim against APCO based on a contractual provision.

3 The Nevada Supreme Court has long held that even if the language of a contract is followed,
4 if "one party to the contract deliberately countervenes the intention and spirit of the contract, that
5 party can incur liability for breach of the implied covenant of good faith and fair dealing." *Hilton*
6 *Hotels v. Butch Lewis Productions*, 107 Nev. 226, 232, 808 P.2d 919, 922–23 (1991). There is no
7 question that APCO acted against the spirit of the contract and prevented Helix from recovering its
8 extended general conditions when it settled with CNLV and was paid its own delay damages. As
9 such, Helix's only vehicle to recover those costs after APCO's settlement with CNLV was through
10 APCO. APCO cannot shield itself from the consequences of its bad faith acts by hiding behind a
11 contract provision in the contract it "deliberately countervene[d] the intention and spirit of."

12 **B. APCO's Arguments Regarding Helix's Project Manager Costs Are Based on**
13 **Conclusions Not Reached by This Court and are Contradicted by the**
14 **Evidence Presented at Trial**

15 APCO's arguments regarding Helix's award of damages for Kirk Williams' time appears
16 to arise from a mere misstatement in the Court's FFCL. In Paragraph 22 of the FFCL, the Court
17 states that Mr. Williams' time was only accurately tracked through Helix's Job Cost Report.
18 However, this is the opposite of what Mr. Williams' testified to at trial.⁶ Mr. Williams testified that
19 the time he recorded in the Job Cost Report was not accurate, as he was tracking his time on other
20 projects despite working the amount claimed on the Project each day.⁷ Mr. Williams testified that
21 in order to limit the perceived costs on the Project, he would track his time spent on the Project to
22 other projects because the appearance of going over budget on the Project would negatively reflect
23 on him.⁸ In other words, the Job Cost Report captured only a fraction of the time he actually spent
24 on the Project and is therefore not an accurate reflection of his time and Helix's costs. Instead, the
25 accurate indicator of Mr. Williams' time is the claim for extended overhead that Mr. Williams
26 himself put together contemporaneous with the Project. Mr. Williams testified credibly regarding
27 the amount of work he completed daily for the Project.⁹ APCO also appears to insinuate that Mr.

28 ⁶ Exhibit 1, 75:18-25; 77:5-9

⁷ *Id.* at 76:2 – 77:25.

⁸ *Id.* at 76:13-23.

⁹ *Id.* at 66:22 – 67:9.

Williams was reassigned to another project in March 2013 when, in reality, Mr. Williams worked on both the Project and a new project simultaneously, never stopping work on the Project until its completion in October of 2013.¹⁰ In fact, Mr. Williams testified specifically that having the new job start “doesn’t change the fact of the duties that [he] still was required to do” on the Project.¹¹

APCO argues that the Court “rejected any suggestion that Helix was entitled to four hours of everyday [sic] for Williams’ time.” This Court never made such a ruling. APCO further argues that the Court rejected Helix’s billings, despite the Court awarding Helix the entirety of the amounts claimed in those billings other than for Ray Prietzel’s time. Finally, APCO asserts that the Court limited Helix’s recovery to the actual costs reflected in the job cost report. Again, this plainly contradicts the testimony at trial and the actual decision given by the Court which made no reference to limiting Helix to the amounts contained in the Job Cost Report. In fact, a significant amount of time at trial was dedicated to explaining why numerous costs incurred by Helix would not be reflected in the Job Cost Report. For instance, neither Helix’s job trailer or project truck are included in Helix’s Job Cost Report, yet Helix actually incurred costs for these items on the Project and the Court included them in its award.

APCO’s arguments are based entirely off incorrect assertions regarding what this Court held and completely ignores the testimony of Mr. Williams that was introduced to support Helix’s claimed Project Manager costs. While APCO complains that “substantial evidence” does not support the Court’s award, Mr. Williams’ testimony was persuasive and completely supported the claimed costs.

III. CONCLUSION

APCO’s Motion should be denied, as substantial evidence supports the Court’s decision to award Helix damages for the time attributable to Kirk Williams, and the majority of APCO’s arguments for reducing that award are based upon asserted findings this Court did not make. Furthermore, because the Court overlooked Helix’s stronger argument regarding NRS 338.485(2)(c)(4), even if APCO were correct that the damages awarded by the Court would be

¹⁰ *Id.* at 77:15-25.

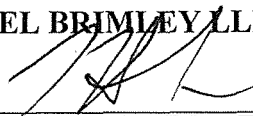
¹¹ *Id.* at 77:21-23.

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1 barred by the no damage for delay provision, that provision is void and unenforceable.

2 Dated this 29th day of July, 2019.

3 **PEEL BRIMLEY LLP**

4 

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Helix Electric of Nevada, LLC

**COUNTERMOTION FOR AMENDMENT OF FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

I. INTRODUCTION

While APCO believes the Court erred in its decision by awarding Helix more than was supported by evidence at Trial, Helix believes that the Court actually overlooked several important issues and evidence when reaching its conclusion that led to Helix being awarded less than it should have been. First, the Court did not address one of the two NRS 338.485 arguments presented by Helix to render the no damage for delay clause unenforceable.

Second, Helix believes the Court erred in limiting Helix's recovery to the same compensable period APCO accepted through its settlement with CNLV. Helix believes the Court overlooked the fact that APCO made a business decision to accept CNLV's settlement offer which excluded four months of its claim for extended general conditions, even though Joe Pelan, APCO's General Manager, testified that he disagreed with CNLV's decision to eliminate those four months. Moreover, APCO never even informed Helix of CNLV's determination of noncompensable days, let alone allowed Helix the opportunity to dispute it, making it improper for Helix to be bound by those same terms.

Lastly, the Court appears to have misconstrued Mr. Prietzel's testimony, as it found that he was not engaged in superintendent duties from the period of May through October 2013 simply because he was not supervising other Helix employees. However, Mr. Prietzel clearly testified that he continued to perform superintendent duties and responsibilities even though he was the sole Helix employee on the Project. Specifically, Mr. Prietzel testified extensively that the superintendent duties he continued to carry out throughout the tail end of the Project took up at least half of his day, every day.

Accordingly, Helix believes this Court should amend its Findings of Fact and Conclusions of Law and award Helix the full amount of its Claim.

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1 **II. LEGAL ARGUMENTS**

2 **A. The Court Overlooked Helix’s Arguments Regarding NRS 338.485(2)(c)(4)**
3 **and Should Have Found the No Damage for Delay Provision Void and**
4 **Unenforceable**

5 As was argued above in the Opposition, Helix believes the Court overlooked the second
6 prong of the NRS 338.485 argument made by Helix at trial. NRS 338.485(2)(c)(4) states that a
7 clause that acts to waive, release or extinguish a claim or right for damages that the contractor may
8 otherwise possess or acquire as a result of a delay that is “[c]aused by a decision by the public body
9 to significantly add to the scope or duration of the public work” is against public policy and is void
10 and unenforceable.

11 The Project’s duration was scheduled for 12 months yet, after numerous delays and changes
12 made by CNLV, the Project took approximately 21 months to complete. Nearly doubling the
13 duration of the Project is certainly a “significant” addition to the duration of the public work. At
14 trial, Joemel Llamado testified that CNLV granted APCO an extension of time of 180 non-
15 compensatory days and 165 compensatory days.¹² In his testimony, Mr. Llamado stated (i) CNLV
16 made the ultimate decision to extend the duration of the Project; and (ii) he believed that an
17 extension of 180 days to the Project originally scheduled to last one year was a significant addition
18 to the duration of the Project.¹³ In reality, the Project was actually delayed approximately 287 days.
19 Furthermore, this Court also acknowledged that CNLV made numerous changes to the Project
20 throughout its duration in its FFCL and that these changes impacted the parties.¹⁴ As a result, while
21 CNLV may not have abandoned the Project, it certainly significantly added to the duration of the
22 public work, triggering NRS 338.485(2)(c)(4) and rendering the no damage for delay clause void
23 and unenforceable.

24 ///

25 ///

26 ///

27 ¹² Exhibit 1, 141:4 – 144:9.

28 ¹³ *Id.*, 141:14 – 142:19.

¹⁴ See FFCL, at ¶ 53.

1 **B. The Court Overlooked the Fact that APCO Made a Business Decision to Settle**
2 **with CNLV for Less than its Claim for Extended General Conditions and**
3 **Never Provided Helix with an Opportunity to Dispute CNLV's Offered**
4 **Compensable Period**

5 The Court held in its FFCL that Helix's recovery for extended overhead costs would be
6 limited in the same manner that CNLV limited APCO's recovery. Helix believes the Court
7 overlooked both the fact that Joe Pelan testified that APCO made a business decision (i) not to the
8 challenge CNLV's position regarding the four months for non-compensable delay; and (ii) not to
9 inform Helix of its settlement with CNLV or provide Helix with the opportunity to dispute CNLV's
10 reduction of the extended overhead claim from nine months to five months. Specifically, when Mr.
11 Pelan was asked whether he reached out to Helix to "give them an opportunity to present some sort
12 of defense or support to rebut what [CNLV] was saying" regarding CNLV's assertion of
13 noncompensable days, he responded "No."¹⁵ Through the following exchange, it came to light that
14 APCO made a business decision to accept CNLV's settlement offer which significantly reduced its
15 claim for extended general conditions, and that it did so without discussing it with Helix or any
16 other potentially affected subcontractor:

16 Q [Mr. Domina]: Okay. So APCO made a business decision to take
17 what was being offered, which admittedly was 119 days less than
18 what it was seeking by way of its initial change order request; is that
19 correct?

20 A [Mr. Pelan]: That's correct.

21 Q: Okay. And you made that business decision without including any
22 discussion with your subcontractors, including Helix; correct?

23 A: That's correct.¹⁶

24 Accordingly, Helix's recovery due to APCO's breach of the covenant of good faith and fair
25 dealing should not be limited due to APCO's decision not to fight CNLV's assessment, especially
26 because Helix was never given an opportunity to rebut CNLV's position. APCO made a business
27 decision to accept CNLV's offer and admitted that it never even provided Helix an opportunity to
28 dispute this reduction. Helix should not be penalized by having its damages limited due to APCO's
very same bad faith conduct that forms the basis for those damages. Helix would have disputed
CNLV's assessment if it had been given the chance, or had Helix even been aware of the dialogue

¹⁵ Exhibit 3, 34:18-23.

¹⁶ *Id.* at 35:18 – 36:1.

1 between CNLV and APCO. Instead, APCO prevented Helix from doing so and took the money
2 from CNLV and then continued to mislead Helix as to what was happening with Helix's claim. As
3 a result, this Court should allow Helix to recover for the full duration of the delay and increase
4 Helix's award by \$55,584.28.¹⁷

5
6 **C. The Court Misinterpreted Ray Prietzel's Testimony and Overlooked the**
7 **Substantial Amount of Superintendent Work that Needed to be Completed for**
8 **the Project Even When Mr. Prietzel Was Operating Without a Crew**

9 In the Court's FFCL, the Court reasoned that Ray Prietzel's superintendent costs sought by
10 Helix were not recoverable because Mr. Prietzel "was completing base Subcontract work and
11 change order work," "was paid for his time on site under the approved change orders," and was
12 "supervising only himself." While it is true that Mr. Prietzel was the only Helix employee
13 completing work on the Project for the last period of the Project, Mr. Prietzel testified exhaustively
14 about the amount of superintendent work that was required of him every day regardless of how
15 many employees Helix had on site. Mr. Prietzel testified that his time on site was split roughly 50-
16 50 between engaging in superintendent duties and completing contract / change order work.¹⁸ In
17 fact, Mr. Prietzel testified that as the Project came to a close, the amount of time required for
18 superintendent duties would actually increase further.¹⁹

19 When this Court asked Mr. Prietzel directly how much time he spent doing actual hands-on
20 contract work for the Project after he was the only Helix employee on site, Mr. Prietzel responded:

21 I'd say the best -- the best and most honest thing would be about a
22 50-50 time. The amount of paperwork that it takes to consume and
23 start on that and checklists and the safety responsibilities we have --
24 because as a single father I'm going home safe -- so we have to be
25 safe and the actual work, that would be my most honest answer.²⁰

26 While Mr. Prietzel was able to continually spent about half his time completing contract
27 and change order work, he was forced to work in an incredibly inefficient manner due to the fact
28 that the work was not being released to him in a timely fashion, to the point that it was more cost

¹⁷ Mr. Prietzel's time should be compensable for this period due to the fact that Helix had a full crew working during this period regardless of this Court's rulings on the arguments in Section II(C) below.

¹⁸ Exhibit 2, 19:20 – 20:5.

¹⁹ *Id.* at 20:3-5.

²⁰ *Id.* at 32:15-20.

1 efficient for him to handle the Project alone.²¹

2 Mr. Prietzel testified that he was required to attend various Project meetings on a frequent
3 basis, coordinate and walk the site with various inspectors, complete all the necessary paperwork
4 for the Project, work with various other trades to solve problems that arise on a day-to-day basis as
5 well as coordinating work with those trades.²² These were duties and responsibilities that only
6 superintendents perform. Mr. Prietzel also explained how safety inspections were necessary each
7 day and were part of the superintendent's duties, as it was his responsibility to not only make sure
8 Helix's employees were safe, but also that any other trades working in the areas where Helix was
9 working were also safe.²³ Mr. Prietzel went on to testify that he conducted these inspections and
10 undertook all of the general superintendent duties even when he was the only Helix employee on
11 site.²⁴ Further, as this Court noted, Helix was required to have a superintendent on site at all times
12 by the Labor Commissioner and OSHA regulations.²⁵ Kirk Williams also testified to the daily
13 duties of Helix's superintendent when explaining why the four hours per day assessment was
14 proper. Mr. Williams, who oversaw Mr. Prietzel for the Project, stated:

15 Helix requires extensive amounts of paperwork from project
16 manager as well as superintendents. That is, I would say, like I said,
17 three or four times as much as your average contractor. So that
18 there's multiple – there's dailies, there's check-in of equipment, all
19 of this has to get signed, submitted into the office, and it has to be
20 done daily performance that supervisors – Helix feels supervisors are
21 required to do.²⁶

22 At no point was Mr. Prietzel's credibility regarding the superintendent work he was required
23 to do on a daily basis challenged or impeached. At no point did APCO present arguments or
24 evidence that Mr. Prietzel was not actually undertaking the superintendent duties he testified to. As
25 such, Helix firmly believes that Mr. Prietzel's time should not have been excluded from Helix's
26 recovery, as half, if not more, of Mr. Prietzel's time during the delay period was spent solely on
27 superintendent work each day, for which Helix has not been compensated. Accordingly, Helix

28 ²¹ *Id.* at 13:9-25.

²² **Exhibit 1**, 168:53 – 175:17.

²³ *Id.* at 169:13-25; 175:24 – 178:15.

²⁴ **Exhibit 2**, 13:5-8.

²⁵ FFCL, at ¶ 26.

²⁶ **Exhibit 1**, 67:13-20.

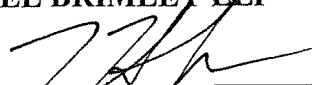
1 requests that this Court amend its Findings of Fact and Conclusions of Law to permit the recovery
2 of Mr. Prietzel's time as claimed by Helix in the amount of \$57,400.00 for the period of January
3 through October 2013. In the event the Court is not convinced that Helix is entitled to recover
4 damages for the entire delay period as argued above, Helix should be awarded \$37,800.00 for the
5 period of May through October 2013.

6 **III. CONCLUSION**

7 Helix believes this Court overlooked several key areas of testimony in drafting its FFCL
8 that resulted in Helix's recovery being negatively impacted. The evidence at trial supported the
9 argument that the no damage for delay provision should be rendered void and unenforceable due
10 to CNLV's extension of the Project. The evidence established that Helix should not be bound by
11 APCO's decision not to fight CNLV's reduction of compensable days, and refusal to include Helix
12 in this decision-making process. And the evidence established that even when Mr. Prietzel was the
13 sole Helix employee on-site, he was performing an enormous amount of superintendent duties
14 independent of the contract and change order work he was being compensated for by APCO. As a
15 result, Helix believes the Court should amend its FFCL and increase Helix's award to the full
16 amount sought by Helix, \$138,151.40.

17 Dated this 29th day of July, 2019.

18 **PEEL BRIMLEY LLP**

19 
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28

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 28th day of July, 2019, I caused the above and foregoing document, **HELIX ELECTRIC OF NEVADA, LLC'S (i) OPPOSITION TO APCO CONSTRUCTION, INC.'S AND SAFE INSURANCE COMPANY OF AMERICA'S MOTION FOR CLARIFICATION AND/OR AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW; AND (ii) COUNTERMOTION FOR AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW**, to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☒ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____

to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

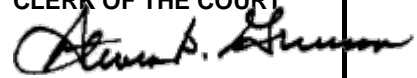
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EXHIBIT 1



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

HELIX ELECTRIC OF NEVADA LLC,)
)
Plaintiff,)
)
vs.)
)
APCO CONSTRUCTION, et al.,)
)
Defendants.)

CASE NO. A-16-730091-B
DEPT NO. XI

**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

MONDAY, JUNE 3, 2019

BENCH TRIAL - DAY 1

APPEARANCES:

FOR THE PLAINTIFF:

CARY B. DOMINA, ESQ.
JEREMY D. HOLMES, ESQ.
RONALD J. COX, ESQ.

FOR THE DEFENDANTS:

JOHN R. JEFFERIES, ESQ.

RECORDED BY: JILL HAWKINS, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

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1 BY MR. DOMINA:

2 Q You recognize this document?

3 A Yes.

4 Q And what is this?

5 A This is the additional amount from September through
6 October for extended overhead of that time.

7 Q The 26,304, correct?

8 A Yes.

9 MR. DOMINA: And then, Chris, if you'd go to page 3
10 of that document.

11 BY MR. DOMINA:

12 Q Is this the breakdown that we looked at earlier?

13 MR. DOMINA: If you could twist it. There.

14 BY MR. DOMINA:

15 Q Is this the breakdown of -- similar to what we saw
16 for the months of January through August?

17 A Yes.

18 Q Okay. Now, looking at -- since --

19 MR. DOMINA: Chris, if you can scroll down to the
20 language right under the table there.

21 BY MR. DOMINA:

22 Q Okay. Yeah. It says -- the second line says,
23 Project manager based on four hours a day at \$65 an hour.
24 Explain that to me. How did you come up with that charge?

25 A Well, there's a certain amount of daily tasks

1 performed with each project that you do at Helix. And I say
2 Helix, meaning Helix-specific, because at Helix you do about
3 three if not four times the amount of tasks than the normal
4 contractor, if you will. It's a -- basically, a requirement,
5 part of their systems. That -- I can't say that it's all four
6 hours every day. Some hours -- sometimes it's eight, sometimes
7 it's six, sometimes it's two. But on average, that's roughly
8 what you're spending on each project, roughly, that you're
9 doing at Helix.

10 Q Okay. And so the line item below that or the
11 description below that says superintendent at four hours a day
12 at 70 bucks an hour. How did you come up with that analysis?

13 A Same principle. Helix requires extensive amounts of
14 paperwork from project manager as well as superintendents.
15 That is, I would say, like I said, three or four times as much
16 as your average contractor. So that there's multiple --
17 there's dailies, there's check-in of equipment, all of this has
18 to get signed, submitted into the office, and it has to be done
19 daily performance that supervisors -- Helix feels supervisors
20 are required to do.

21 MR. DOMINA: Okay. Chris, take -- let's go back to
22 page 11 of Exhibit 25.

23 BY MR. DOMINA:

24 Q So we looked at the e-mail where Eddie had forwarded
25 the two -- the invoices for the two additional months. Below

1 MR. DOMINA: Okay. Chris, can you pull that up for
2 us here? And then blow it up, because now I'm out of a copy.
3 I was not going to --

4 THE COURT: Well, you gave us a yellow highlighted
5 version.

6 MR. DOMINA: I did. That's okay.

7 THE COURT: Okay. That okay with you?

8 MR. JEFFERIES: Sure.

9 THE COURT: All right. Okay. Thank you.

10 MR. DOMINA: We can make another. We can replace it
11 if we need to. But --

12 BY MR. DOMINA:

13 Q So what I'd like you to look at here is, starting in
14 February --

15 MR. DOMINA: Actually, let's go down to March, Chris.
16 Scroll down.

17 BY MR. DOMINA:

18 Q So in March, if you look at the total, all of those
19 weeks are there. You have March 3rd, 10th, 17th, 24th, and
20 31st. Those are all the week ending. And I calculated, based
21 on the job cost report, the number of hours that were reflected
22 in that report. And it showed for a total of 13 hours for the
23 month of March 2013. Do you believe that to be an accurate
24 reflection of the time that you spent on the project?

25 A No.

1 Q And why would you say that?

2 A Well, one, as I previously mentioned, at Helix, you
3 do three to four times the amount of work that you normally do
4 for contractors. As a salaried employee, and you have to turn
5 in a time card at Helix -- you typically work in a project
6 manager role at Helix, you typically work anywhere from 55 to
7 60 hours in a week. I'd say average contractor is more like
8 45, 55 hours. So with all the project management duties that
9 you have -- it's a salaried position -- you're not overly
10 concerned. A time card is more of a nuisance to you that you
11 just start putting time. You turn in 40 hours, for lack of
12 better terms.

13 Also, I can specifically remember a little bit about
14 this project in that the project management dollars that was
15 allocated in the cost code was starting to take hits because
16 the job was running over longer. So I get graded on
17 performance. Although there's a pending claim, it may have
18 just went away.

19 So you -- so as you're starting new project that
20 had -- may have more additional project management time, you
21 start putting more time over there. But it doesn't change the
22 fact that every day, every week, every month you have the
23 continuous duties that you had to perform from day one.

24 MR. DOMINA: So, Chris, scroll down to the bottom of
25 the table there, April.

1 BY MR. DOMINA:

2 Q So April shows --

3 MR. DOMINA: Whoops, not too far. Just April.

4 BY MR. DOMINA:

5 Q April shows 12 hours of time that you worked on that
6 project, based on what the job cost report reflects; do you
7 believe that that accurately represents the amount of time that
8 you would have spent in April of 2013?

9 A No.

10 Q And again, can you tell me concisely why you believe
11 that is?

12 A Because as long as -- as long at Helix Electric that
13 the job is open, you are required to do certain daily, weekly,
14 and monthly tasks that require a certain amount of time for you
15 to do them in. So I remember specific here, in late March,
16 early April, I was starting a big \$8 million utility solar
17 project that -- hey, we got a new job, everything's going good,
18 this job is going in the extended overhead. That job was about
19 a four-month job, it had a lot of project management time in
20 it.

21 So I start putting more cost over there. But it
22 doesn't change the fact of the duties that I still was required
23 to do as far as invoicing, approval of construction building
24 materials, material recs, equipment requests, the norm from
25 starting from day one. It just doesn't change.

1 A Uh-huh.

2 Q But you don't get paid for that day?

3 A Right.

4 Q Okay. Here, it says APCO was granted 119 -- and I
5 guess my question is can you shed some light on what happened
6 there for APCO to have been granted 119 noncompensatory days?
7 Because it's not talking about future, it's talking about past,
8 would you agree?

9 A It's -- yes. Because we're already -- what's the
10 date of this letter? October 3rd already?

11 Q Right.

12 A Yeah. This is beyond that date, January 11 through
13 May 10th. So.

14 Q Okay. So is it your understanding that the City
15 granted APCO an additional 119 noncompensatory days to the
16 contract?

17 A Correct.

18 Q And that would be a decision that the City makes
19 based on what?

20 A That was actually the decision of the acting City
21 manager at that point, so --

22 Q Okay.

23 A -- that was not my call.

24 Q The buck stopped with him?

25 A Yes.

1 Q He made that decision?

2 A Yes.

3 Q Okay. And then it goes on to say that further review
4 of the subject TIAs indicate APCO should be given an additional
5 61 calendar days of additional time extension but not
6 compensatory.

7 A Yes.

8 Q So if you add the 119 and the 61 --

9 A Okay.

10 Q -- you're an engineer, so you probably know that off
11 the top of your head, right? I have to get the calculator out.
12 But I think it's 180 days.

13 A 180 days, yes.

14 Q Yeah.

15 A Right.

16 Q Do you believe that adding 180 days to a project that
17 was only a one year -- or scheduled to be one year is a
18 significant amount of time to increase the project schedule?

19 A I would say so, yes.

20 Q Let's take a little bit further look into this
21 document. I want to look at this table here. The very middle
22 of the table is where you have general conditions showing up,
23 do you see that?

24 A I see it.

25 Q And it says that the general conditions are

1 \$1,750.65, and do you understand that to be a daily cost -- a
2 daily price?

3 A Yes. Correct.

4 Q So this price is a daily cost that APCO is
5 identifying or claiming against the City, but it's not actually
6 backed up by a job cost report or actual cost, is it?

7 A I don't recall how they got the 1750.55 per day. I
8 don't know.

9 Q Okay. But it's a daily -- it's a -- in other words,
10 if you take a hundred and -- or however many days -- if you
11 take a hundred days and times it by that, that's the general
12 conditions that the City was -- would be agreeing to pay --

13 A Right.

14 Q -- APCO?

15 A Correct.

16 Q All right. Let's go to the last sentence, just above
17 that same table. I guess it's maybe two sentences. It says,

18 Given the numerous changes and multiple
19 delays that occurred during this project, but
20 not included in your TIAs, the City is
21 prepared to offer you compensatory days of
22 165 days from May 10th, 2013, to
23 October 25th, 2013, for a total amount of
24 \$560,724.16, based on the following
25 evaluation.

1 A Uh-huh.

2 Q So is it an accurate statement? If I were to take
3 165 days and times it by that 1,750, that would be the
4 number -- the general condition amount that the City agreed to
5 pay APCO for this delay?

6 A 165 days from May 10th do not compensate for the
7 days. I don't know where they get the 560 because that could
8 be anything from combination of the general conditions, any of
9 his descriptions to get to that particular day.

10 Q Okay.

11 A That amount. But it is accurate to say that it's a
12 quantity times the days. And how they got the quantity first
13 or the actual price per day, I don't know. I don't recall.

14 Q Okay. Fair enough.

15 MR. DOMINA: Let's go to the second page of that
16 document, Chris. I'd like to highlight the -- it's the fourth
17 paragraph, fifth paragraph down that says, By Agreeing. You
18 see that, Chris? So just blow that bottom half up and he'll
19 see it.

20 BY MR. DOMINA:

21 Q Do you see where it says, By agreeing to?

22 A Uh-huh. Yes.

23 Q Okay. Let's start there. It talks about -- it says,
24 By agreeing to and meeting the terms of this offer, it's
25 understood by both parties that the City waives any and all

1 Q Okay. And did you communicate with Kurk Williams?

2 A Yes, I did.

3 Q How often did you communicate with him?

4 A I'd say two to three times a week.

5 Q Okay. Did you ever meet with him in person or just
6 phone calls?

7 A Yes, I met with him in person, also telephone calls
8 or text messages, yes.

9 Q Okay. Did you guys ever walk the site together?

10 A Yes, when he would show up there, first thing we
11 would walk the site or we had site trucks, well, because the
12 site was so big, we would drive around and would show him our
13 progress or any types of delays or, you know, safety issues
14 that might be of concern to him.

15 Q Okay. So you just talked about basically the status
16 of the project and --

17 A Yes.

18 Q -- any issues?

19 A Yeah. Anything to do pertaining to Craig Ranch.

20 Q And did your communications with Mr. Williams
21 continue till the very end of the project?

22 A Yes.

23 Q So as a superintendent, what were some of your
24 day-to-day responsibilities at the project?

25 A To supervise and maintain the labor, the equipment,

1 subcontractors, perform the safety meetings. At the beginning
2 of the job we have safety meetings at the beginning. Fill out
3 daily reports, the timecards, attend the weekly subcontractors
4 meetings with APCO to review the schedule, coordinate
5 inspections, call up City of North Las Vegas, contact them or
6 NV Energy or Century Link to schedule inspections prior to any,
7 you know, work being performed.

8 Q Okay. And were you on the project every day that
9 work was being performed?

10 A Yes.

11 Q Until the very end?

12 A Yes.

13 Q Okay. Why was it important that you were on site
14 every day?

15 A Well, first of all, it would be qualified and trained
16 to notice and make sure the area's safe for all of our
17 employees there, and not just Helix employees, other employees
18 also, conduct those meetings, and I had the OSHA 30 card, so I
19 was qualified to do all of that.

20 Q And safe -- Helix is an electrical contractor, right?

21 A Yes.

22 Q So there's some significant concerns with
23 electricity?

24 A Absolutely. With the trenching and the layout, you
25 know, possible hazard of actually hitting some of that stuff.

1 Q You mentioned contractor meetings; what were those
2 meetings for?

3 A It would be in APCO's trailer, usually Marc Yocum
4 [phonetic] or Noah Holmes would perform those and it would just
5 state the job -- where the job was at, what -- you know,
6 where -- okay, here, we're going to go here under this area, or
7 we're going to go under this area. We need you, you know, just
8 scheduling and laying out the work for not just Helix but for
9 the other subcontractors on that job.

10 Q And how often were those meetings?

11 A Once a week.

12 Q Did everyone attend those, including laborers?

13 A No. It would have just been the foreman's
14 superintendent or supervisors from myself and the other
15 contractors there.

16 Q Okay. So you said that you coordinated work with
17 other trades?

18 A Yes.

19 Q What other trades did you coordinate with?

20 A It would have been with the plumbers, could be the
21 plumber, it was some of the steel engineers. I would have
22 coordinated with APCO.

23 Q And why would you have coordinated with APCO?

24 A Because I was ultimately responsible for laying out
25 the trenches for them to dig. They were dig -- doing the

1 digging and stuff for us, so it was my -- I had to go out there
2 with the prints, so I had to evaluate the area: Is this the
3 correct place to put a trench? Or would there some live
4 utilities or something here? Should we move this here? So me
5 coordinate, me laying it out, that was my responsibility. And
6 then from there they could follow the, you know, the marks or
7 the directive from me.

8 Q Okay. And so that's trenching and back hoeing, and
9 I'm sorry --

10 A Yeah.

11 Q -- I interrupted you. You said plumbers?

12 A Oh, yeah, I'm sorry.

13 Q Why would you be coordinating with plumbers?

14 A Yeah. With a plumber, we had rest room areas that
15 were poured in place in concrete. And in the middle of those
16 restroom areas would have been plumbing chases. And in that
17 plumbing chase, that's where it got kind of crowded. So we
18 would have -- it was a subpanel, it was basically a mini
19 transformer with a panel in there. And I had to coordinate
20 with them, can we put it on this wall or this wall? How are
21 you running your pipes? Where are your automatic flushers
22 going? How are you mounting your racks? It's just one of
23 those deals you just can't throw in there, because then one
24 guy's going to be on top of the other.

25 Also, you know, hey, the mirrors and the sinks are

1 going right here. Hey, there might be a GFI -- GFCI receptacle
2 right there. You want to make sure it doesn't get installed
3 where there's an actual, you know, divider, where the urinals
4 or the stalls are, or if there's a door right there, so it's
5 behind the door. It's got to be met so it's accessible and not
6 in the way of other trades.

7 Q Okay.

8 A So just common practice.

9 Q So as a superintendent, you're basically working with
10 other trades solving problems that come up on a day-to-day
11 basis?

12 A Solving issues that could be problems, just catching
13 them beforehand. But yeah, it had -- it's through
14 communication and preplanning.

15 Q Okay. Did you ever coordinate with landscaping?

16 A Yes.

17 Q Why?

18 A To find out where they're running their 2-inch main
19 water lines. We didn't want to coincide with them. We were
20 doing trenching, find out the depth of their pipes. So, you
21 know, we had a minimum depth we have to require, so if we have
22 to go a little bit deeper, we would go deeper and let them run
23 on top. Also where his valves and stuff were located, let him
24 know, Hey, I'm going to install a pole box here, will this be
25 in the way of possible sprinkler head location or, you know,

1 any of -- or his equipment could go, sometimes he had pedestals
2 with time clocks and stuff like that. So it's just
3 coordination, common practice.

4 Q Okay.

5 THE COURT: Were you doing the trenching or was
6 somebody else?

7 THE WITNESS: APCO was doing the trenching. They had
8 a operator.

9 THE COURT: Okay.

10 THE WITNESS: But I was laying it out to where they
11 had to do the trenching.

12 THE COURT: All right. Thank you, sir.

13 THE WITNESS: You're welcome.

14 BY MR. COX:

15 Q And you laid it out so that they did it correctly,
16 correct?

17 A Yes.

18 Q Okay. So you mentioned inspections. And we'll get
19 into some timecards or daily reports that talk about that. But
20 just briefly, what's the process to getting an inspection?

21 A Well, on the prints on, let's just say, for example,
22 the NV Energy drawings, you know. We get those drawings,
23 there's a project number and a phone number there. So prior to
24 some of the work, I need to call them up and say, Hey, I'd like
25 to schedule for a courtesy meeting to meet the inspector and

1 let him know what our plan is and where we're going to trench
2 this. I just didn't want to start trenching. You know, you
3 want to coordinate with him, Hey, are you happy with this
4 location? Are you good with this? So we would call them out
5 for that.

6 Then once the -- once that was approved where the
7 trenching was going to go, APCO would do the digging. You
8 know, we'd -- I would make sure after I got done painting the
9 trenches, I would go out there and make sure the depth of the
10 trenches were correct, make sure they put sand at the bottom of
11 the trenches, which is required by NV Energy. You know, make
12 sure that the sand was done. Then we would have to call for
13 inspection again, same process, calling him up, schedule him to
14 come out. Vince would usually come out -- that's the
15 inspector's name at the time. He would come out, inspect the
16 trench, see that it was sanded on the bottom, and they say, Go
17 ahead, you can install your conduit now.

18 After the conduit was installed, I would have to call
19 him up again because as a requirement, NV Energy has sand that
20 you have to put over the top of their conduits. They don't
21 like native soil, because there's rocks and stuff in it, and
22 possible damage to the -- you know, the conduit and stuff. So
23 you have to sand it. You recall him out, he inspects the sand,
24 makes sure, you know, it's installed at the proper depth, which
25 I believe was 12 inches.

1 And then after that, they would do their first lift
2 of dirt, type 2 native, do a compaction, and then they would
3 put -- we would put the NV Energy tear tape, which identifies
4 the trench, so if anyone comes behind us and happens to do the
5 digging, you know, in the first foot or two, they would hit
6 that tape and that would notify them, hey, there's an NV
7 Energy, you know, there's a conduit here, so no accidents would
8 occur. So.

9 Q And so you participated in all those inspections?

10 A Yeah, I called all of those. I walked with the
11 inspector and we made sure he passed it and once they passed, I
12 would relay it to either Mark or Noah, say, Hey, Vince passed
13 this trench, you can go ahead and backfill. And, you know,
14 when do you think you're going to have it done? Okay. And
15 then I'll call up the inspection, say, Hey, can you come back
16 out on this date? Schedule it for then and then come out and
17 do that.

18 Q When you say Mark or Noah, who are they with?

19 A Mark Yocum and Noah Holmes, they were the
20 superintendents for APCO Construction.

21 Q Okay. And would inspectors ever talk to take
22 instructions from laborers?

23 A No. They're -- no, they would only report to me.

24 Q Okay. You said earlier when you were describing your
25 daily duties, that you ran safety inspections. Can you tell me

1 about that?

2 A Well, before we start every day, so it's Helix policy
3 every day to do a safety inspection. We have certain topics
4 that are just refreshers, you know, and then also do safety
5 inspections that actually pertain to that job. That job had a
6 lot of heavy equipment and open trenches, so a lot of my safety
7 meetings would be on heavy equipment, you know, what to watch
8 out for, make sure you have your proper PPE on, you know,
9 traffic -- you know, hardhat, gloves, glasses, proper attire,
10 your boots and stuff like that.

11 So, you know, one day we might do heavy equipment,
12 the next day it would probably be -- because here were are in
13 the desert, it's 113 out, it would be heat exhaustion and
14 heatstroke. You know, we've got to make sure not only myself,
15 because, you know, I'll be in the trailer lot doing some of the
16 paperwork, but the other guys working around their other
17 workers, Hey, keep an eye on so-and-so, it's getting hot out,
18 you know, does he look a little flushed, does he need some
19 water? Let's get him in the shade. So just -- it's just
20 different safety meetings every day, just as a reminder, Hey,
21 guys, this is what's happening on the job, we need to watch out
22 for each other.

23 Q Okay. And you've coordinated these safety meetings?

24 A Yeah, every morning I did.

25 Q Okay.

1 A Everyone signed in, and I coordinated the meetings.
2 I picked the topic.

3 Q And then did you also check the areas that you're
4 working in to ensure that they were safe?

5 A Oh, absolutely. Because each night, you know, Craig
6 Ranch Park there's a lot of traffic out there, so sometimes you
7 get vagrants in at night or kids that come in at night, like to
8 mess around. And even though the night before, you know, when
9 we leave, we make sure our barricades are up and everything's
10 safe, sometimes you would come in, the wind would come up,
11 barricades would be down, so we'd have to go back, you know,
12 say, hey, guys, let's get the caution tape back up here.

13 Are there any new hazards? There's other trades and
14 stuff that are in those work areas, you know, we do a safety
15 check where we check all of our extension cords and all of our
16 tools to make sure they're working properly. I'm not sure
17 every other sub out there does that. So it's my
18 responsibility, if my guys are in your work area, and say
19 you're the plumber, I'm going to physically -- I'm going to go
20 and take a look and just make sure your cord is okay. If your
21 cord happens to be frayed and I notice some, you know, the
22 insulation is ripped off and there's a possible chance for my
23 guys to get zapped or electrocuted, you know, if I power off
24 the generator, I'm going to tell them, Hey, let's get -- let's
25 stop or at least let the plumber, hey, let's take this cord out

1 of there, why don't you use our cord to make it a safe
2 environment.

3 Because also goes for iron workers. You know, they
4 use Hilti ramset guns with .22 caliber shots in them, you know,
5 powder actuated tools, and sometimes you find those laying on
6 the ground with an empty shell or a shot in it. Well, if you
7 happen to kneel down, you know, and you don't see that shot,
8 and you kneel down on that, that thing can go off and do some
9 serious damage not only either to your foot or your knee, it
10 wouldn't be a pretty sight. So those are just issues and
11 you've got to take care of it.

12 Q Yeah. And you do that every day, wherever you guys
13 were working to make sure you guys were safe?

14 A Every area we go in has got to be inspected to make
15 sure it's safe.

16 Q Okay. Did you create daily job reports?

17 A Yes.

18 Q Okay. And we're going to go ahead and turn through
19 some of those.

20 MR. COX: Chris, if you could, it's Joint Exhibit 5.

21 THE WITNESS: Is there a book you want me to grab or?

22 MR. COX: They're going to --

23 THE COURT: It should be in the first volume --

24 MR. COX: -- pull up on the screen --

25 THE COURT: -- or you can look on the screen.

1 MR. DOMINA: Okay.

2 THE COURT: Because you will walk in with somebody
3 who is whining and still saying stuff, and I'll say, Oh, gosh,
4 guys, I've got to start my trial.

5 Have a nice evening.

6 (Proceedings recessed for the evening at 4:47 p.m.)

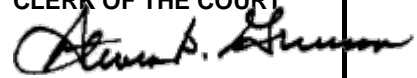
7 -oOo-

8 ATTEST: I do hereby certify that I have truly and correctly
9 transcribed the audio/video proceedings in the above-entitled
10 case.

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13 Dana L. Williams
14 Transcriber
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EXHIBIT 2



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

HELIX ELECTRIC OF NEVADA LLC,)
)
Plaintiff,)
)
vs.)
)
APCO CONSTRUCTION, et al.,)
)
Defendants.)

CASE NO. A-16-730091-B
DEPT NO. XI

**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

TUESDAY, JUNE 4, 2019

BENCH TRIAL - DAY 2

APPEARANCES:

FOR THE PLAINTIFF: CARY B. DOMINA, ESQ.
JEREMY D. HOLMES, ESQ.
RONALD J. COX, ESQ.

FOR THE DEFENDANTS: JOHN R. JEFFERIES, ESQ.

RECORDED BY: JILL HAWKINS, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

JD Reporting, Inc.

I N D E X

W I T N E S S E S

WITNESSES FOR THE PLAINTIFF:

RAINER PRIETZEL

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Cross-Examination by Mr. Jefferies 20

VICTOR FUCHS

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Cross-Examination by Mr. Jefferies 70

ROBERT JOHNSON

Direct Examination by Mr. Domina 83

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WITNESSES FOR THE DEFENDANTS:

JOE PELAN

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PLAINTIFF'S EXHIBITS ADMITTED:

PX101 December 14, 2015, Email string regarding promissory note (promissory note attached) 67

PX102 Exhibit 20 to Joe Pelan September 8, 2017, Deposition 45

1 handle that myself. I could take care of all the paperwork,
2 the documentations, the drawings, the updates, and if any work
3 that was delayed could be released, I could handle it at that
4 time myself.

5 Q So you're still doing obviously the superintendent
6 work with the paperwork, the as-builts, the safety inspections,
7 all of that even though you're the only guy there?

8 A Yes. That's correct.

9 Q And you said as work is released you could get it.
10 What do you mean by that?

11 A Well, you might want to go over to a certain area,
12 and it's still not ready for you to install that. You know,
13 there's quite a delay. Hey, there's an issue right here. So
14 then I would probably go to another area, see if we could
15 possibly take care of some of the items in the other area and
16 stuff.

17 Q So you're still performing work as that work is
18 released to you and available to you?

19 A Correct.

20 Q So if you had let's say the four guys that you
21 previously had back on the site, would you be able to get that
22 work done quicker?

23 A It wouldn't be cost effective. I mean, I could do
24 that myself. Quicker, yeah, but at the time, if it's not
25 ready, they'd be standing around twiddling their thumbs, and

1 turning it over, you know, you're going to have the grand
2 opening at the park. There was some existing light poles out
3 there that, you know, we didn't have to deal with. Some of
4 those lights were not working, were not functional. So I would
5 just bring it to their attention. Hey, you know, you either
6 need to order fuses, new lamps or ballasts, and we would just
7 walk the site showing them, hey, this is the new fixtures that
8 Helix installed. These were the existing fixtures that we
9 didn't install. That would be a North Las Vegas punch list,
10 you know, for them to repair that before the grand opening.

11 Q Okay. Thank you. And then it says return Site Truck
12 Number 66. What is the site truck?

13 A That would be our work site truck to where we haul
14 material, tools and stuff around since the park is so big. You
15 know, we could be in multiple areas different times. So that's
16 truck that we got from our tool department and stuff also.

17 Q Okay. So as of 10 -- October 10th, 2013, or up
18 until October 10th, 2013, the site truck was on site?

19 A That's correct. Number 66. Yes.

20 Q Okay. On average, how much time would you say you
21 spent doing superintendent work or the actual physical work?

22 A To break it in between, it would probably be 50-50 or
23 slightly more. Because closing out a job, you'll be doing a
24 lot of documentation and files and reports and the blueprint
25 drawings, you know, the as-builts, turning over the files, you

1 know, leasing it, walking with North Las Vegas and the
2 inspectors, make sure they're approving, you know, all of our
3 methods and means that we did. So towards the end, towards
4 finishing off a job like that, it would be more towards the
5 superintendent's side I would say.

6 MR. COX: Okay. I don't have any other questions.
7 Thank you.

8 THE COURT: Cross-examination.

9 MR. JEFFERIES: Yes, Your Honor. May I do it from
10 counsel table?

11 THE COURT: It's between you and Jill.

12 CROSS-EXAMINATION

13 BY MR. JEFFERIES:

14 Q Good morning, sir.

15 A Good morning. I hope you enjoyed your vacation.

16 Q Last night you mean?

17 A Yeah.

18 Q Sir, you've gone through a number of duties, be it
19 coordinating inspections, doing paperwork. Did you perform
20 those duties in 2012 as well?

21 A That would have been Rick Clement when he was there.

22 Q Okay. And he was the?

23 A He was the superintendent.

24 Q Okay. And when did he stop serving as the
25 superintendent?

1 THE COURT: Do you remember something about actuators
2 going missing?

3 THE WITNESS: Actuators going missing?

4 THE COURT: If you don't that's okay.

5 THE WITNESS: I write off the -- the only actuators I
6 could think is if it would be some in the irrigation pond, or
7 the other actuators would be for the plumbers and that -- but
8 that would be it. So honestly, no, not off the top of my head.

9 THE COURT: Okay. After May 3rd, 2013, when you
10 didn't have the other guys at the site anymore, can you give me
11 an estimate of how many hours per day you worked on the project
12 realtime.

13 THE WITNESS: Actually hands on?

14 THE COURT: Hands on.

15 THE WITNESS: I'd say the best -- the best and most
16 honest thing would be about a 50-50 time. The amount of
17 paperwork that it takes to consume and start on that and
18 checklists and the safety responsibilities we have -- because
19 as a single father I'm going home safe -- so we have to be safe
20 and the actual work, that would be my most honest answer.

21 THE COURT: Okay. Thank you, sir.

22 THE WITNESS: You're welcome.

23 THE COURT: Redirect.

24 MR. COX: I have no redirect, Your Honor.

25 THE COURT: Okay.

1 THE COURT: Can everybody get here by 9:00?

2 MR. DOMINA: Yes.

3 THE COURT: Okay. All right. We'll see you then.

4 Have a nice evening.

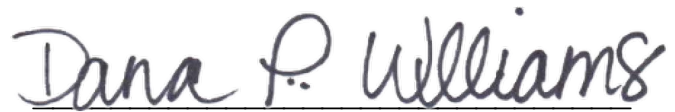
5 (Proceedings concluded for the evening at 4:47 p.m.)

6 -oOo-

7 ATTEST: I do hereby certify that I have truly and correctly
8 transcribed the audio/video proceedings in the above-entitled
9 case.

10

11

A handwritten signature in dark ink, reading "Dana L. Williams". The signature is written in a cursive style with a horizontal line underneath the name.

12

Dana L. Williams
Transcriber

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EXHIBIT 3

CLERK OF THE COURT
Albert B. Hanson

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

HELIX ELECTRIC OF NEVADA LLC,
Plaintiff,
vs.
APCO CONSTRUCTION, et al.,
Defendants.

CASE NO. A-16-730091-B
DEPT NO. XI

**TRANSCRIPT OF
PROCEEDINGS**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

WEDNESDAY, JUNE 5, 2019

BENCH TRIAL - DAY 3

APPEARANCES:

FOR THE PLAINTIFF:

CARY B. DOMINA, ESQ.
JEREMY D. HOLMES, ESQ.
RONALD J. COX, ESQ.

FOR THE DEFENDANTS:

JOHN R. JEFFERIES, ESQ.

RECORDED BY: JILL HAWKINS, COURT RECORDER
TRANSCRIBED BY: JD REPORTING, INC.

I N D E X

Closing argument for the Plaintiff by Mr. Domina	99
Closing argument for the Defendants by Mr. Jefferies	112

WITNESSES FOR THE DEFENSE:

JOE PELAN

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Redirect Examination by Mr. Jefferies	92

E X H I B I T S

PLAINTIFF'S EXHIBITS ADMITTED:

PX103	43
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DEFENSE EXHIBITS ADMITTED:

DX214	5
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1 **LAS VEGAS, CLARK COUNTY, NEVADA JUNE 5, 2019, 9:04 A.M.**

2 * * * * *

3 THE COURT: So you ready?

4 MR. JEFFERIES: Yes, Your Honor.

5 THE COURT: I was trying to remember last night,
6 Mr. Domina, how many times Mr. Pelan has been in front of me
7 because he's at settlement conferences and proceedings, and he
8 mentioned one of the cases yesterday, a project I had done the
9 settlement conference on, and I had forgotten that one.

10 **JOE PELAN**

11 [having been called as a witness and being first duly sworn,
12 testified as follows:]

13 THE COURT: It makes you feel old.

14 THE CLERK: Thank you. Please be seated. Please
15 state and spell your name for the record.

16 THE WITNESS: Joe Pelan. J-o-e, P-e-l-a-n.

17 THE COURT: And I don't even want to count how many
18 cases Helix has been involved in.

19 MR. JEFFERIES: May I approach, Your Honor?

20 THE COURT: You can.

21 MR. JEFFERIES: May I approach?

22 THE COURT: Yes, you can.

23 (Pause in the proceedings.)

24 THE COURT: Next in order.

25 So I am suffering from allergies pretty bad today.

1 for whatever reason for that's about 25 percent or so of those
2 fixtures. And why they weren't delivered, I do not know. They
3 were way late.

4 Q Okay. So that's what you meant --

5 THE COURT: The ones from Graybar were way late?

6 THE WITNESS: Yes.

7 BY MR. DOMINA:

8 Q Okay. And so that's what you meant by sort of?

9 A Yes, sir.

10 Q So they weren't going to pay for it. It wasn't in
11 their contract to pay for it, but you said that it was this
12 kind of side deal that Victor was going to, to help you out a
13 little bit, do the submittals and submit the purchase order to
14 Graybar?

15 A Yes. He had them send it to me directly.

16 Q Using APCO's money to pay for it?

17 A Yes, sir.

18 Q Okay. Did you at the time that you were told this
19 information from Mr. Duvall, did you reach out to Victor or
20 anyone else at Helix and, one, either tell them about this
21 issue, or two, give them an opportunity to present some sort of
22 defense or support to rebut what the city was saying here?

23 A No.

24 Q Okay. And why didn't you do that?

25 A Because I handle each situation one at a time.

1 Q Did you feel that you -- and, in fact, today you
2 testified, well, you thought there might have been some merit,
3 but, you know, you really didn't like that. Were there -- did
4 you want to rebut? Did you want to reject the city's position
5 that 119 days of that nine-month delay were compensable?

6 A You're asking me what I wanted to do?

7 Q Did you feel that you should have rejected those 119
8 days?

9 A Well, when there's this much money involved, I go see
10 the owners. And I said, look --

11 Q Just let me stop you there. Owners of APCO?

12 A Yes, sir.

13 Q Okay. Thank you. Keep going.

14 A Sorry. And I said we put in a million dollar change
15 order. I don't know if it's the timing of this. It's not the
16 timing of this document. They're offering 560. Do you want me
17 to take it and not file a claim, and they said, yes.

18 Q Okay. So APCO made a business decision to take what
19 was being offered, which admittedly was 119 days less than what
20 it was seeking by way of its initial change order request; is
21 that correct?

22 A That's correct.

23 Q Okay. And you made that business decision without
24 including any discussion with your subcontractors, including
25 Helix; correct?

1 A That's correct.

2 Q Let's take a look at the -- this table here. The
3 general conditions, the total of -- if you go to the far right,
4 it says daily price \$365 or 365 days. There's a
5 Number 1,107 --

6 THE COURT: What exhibit are you on?

7 MR. DOMINA: Oh. I thought I was still on
8 Exhibit 22. Sorry, Your Honor.

9 THE COURT: I was just checking.

10 BY MR. DOMINA:

11 Q Okay. So that table there, you look to the far
12 right, 1,750?

13 A There must be something in here. Sorry.

14 Q Allergies?

15 A Something.

16 THE COURT: So it's not just me?

17 THE WITNESS: No. It's something in here I think.

18 MR. DOMINA: Mine start in the spring for some --
19 Whatever it is in the spring I get.

20 THE COURT: Well, we got a lot of rain this year. So
21 a lot of things are blooming, and a lot of people are sick.

22 MR. DOMINA: Yeah.

23 THE COURT: Which means everybody at the courthouse
24 is sick because, boy do we get a lot of the public in here.

25 MR. DOMINA: A lot of the, yes, very diverse public

1 I'm just going to just briefly say if there is a no damages for
2 delay clause, and it was talked about, NRS 338.485 clearly says
3 that on public works projects it's void and unenforceable if
4 the delay was either so unreasonable as to amount to an
5 abandonment of the project, which nine months was, or if it's
6 caused by the city's decision to significantly add to the
7 duration of the project.

8 And that's why I asked Mr. Pelan who made the
9 decision. He said, We did. Because now we fall under the
10 fourth prong of that section and clearly show that no damages
11 for delay is void and unenforceable under this situation.

12 The other argument that they say is we didn't follow
13 our -- the claim procedure that's in the prime contract and/or
14 the subcontract. That goes again to this concept that they
15 were telling us that the city rejected our claim based on the
16 lack of backup.

17 So that was a misrepresentation based on what
18 Mr. Pelan -- or what Mr. Llamado was saying from the city. How
19 could we have gone through any appeals process, any appeal that
20 we tried to effectuate would have been a -- a futile effort
21 because it wasn't being appealed under the right assumption.
22 If we had gone and tried to do an appeal as they're saying, the
23 appeal process would have been a hoax because it wasn't being
24 rejected for backup. It was being rejected because they didn't
25 put it into their own claim. So again, they're trying to use

1 ATTORNEYS: Thank you, Your Honor.

2 THE COURT: Even though they disagree on several
3 points.

4 THE CLERK: June 21st for the status check.

5 THE COURT: Ramsey.

6 THE MARSHAL: Yes, ma'am.

7 THE COURT: If you would, I have one book that I've
8 made notes in.

9 THE MARSHAL: Okay.

10 THE COURT: I have it. But would you put these
11 others in a box and not let them touch the money source box
12 because although I've done the draft of my decision, it's not
13 out of the office yet.

14 So all right, guys. See you later.

15 (Proceedings concluded at 11:55 a.m.)

16 -oOo-

17 ATTEST: I do hereby certify that I have truly and correctly
18 transcribed the audio/video proceedings in the above-entitled
19 case.

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22 Dana L. Williams
23 Transcriber
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Exhibit 6

Exhibit 6

JUDG

CARY B. DOMINA, ESQ.

Nevada Bar No. 10567

RONALD J. COX, ESQ.

Nevada Bar No. 12723

JEREMY HOLMES, ESQ.

Nevada Bar No. 14379

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Attorneys for Plaintiff

Helix Electric of Nevada, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

HELIX ELECTRIC OF NEVADA, LLC, a
Nevada limited liability company,

Plaintiff,

vs.

APCO CONSTRUCTION, a Nevada corporation;
SAFECO INSURANCE COMPANY OF
AMERICA; DOES I through X; and BOE
BONDING COMPANIES I through X,

Defendants.

CASE NO. : A-16-730091-C
DEPT. NO. : XI

FINAL JUDGMENT

This matter having come before the Honorable Elizabeth Gonzalez on for a non-jury trial beginning on June 3, 2019, and continuing day to day, until its completion on June 5, 2019; Plaintiff HELIX ELECTRIC OF NEVADA, LLC (“Helix”), was represented by and through its counsel, Cary B. Domina, Esq. and Ronald J. Cox, Esq., of the law firm of Peel Brimley LLP, and Defendants APCO CONSTRUCTION (“APCO”) and SAFECO INSURANCE COMPANY OF AMERICA (“Safeco”), were represented by and through their counsel, Randy Jeffries, Esq. of Fennemore Craig; the Court having read and considered the pleadings filed by the parties; having reviewed the evidence admitted during the trial; having heard and carefully considered the

1 testimony of the witnesses called to testify; having considered the oral and written arguments of
2 counsel, and with the intent of rendering a decision on all remaining claims before the Court
3 pursuant to NRCP 52(a) and 58, the Court hereby enters its Final Judgment pursuant to the Court's
4 Findings of Fact and Conclusions of Law¹ and the Court's ruling on Helix's Motion for Fees, Costs
5 and Interest as follows:

- 6 1. **IT IS HEREBY ORDERED** that, as to Helix's Claims for Breach of Contract and
7 Breach of the Implied Covenant of Good Faith and Fair Dealing against APCO, this
8 Court finds in favor of Helix and awards damages in the amount of \$43,992.39 together
9 with interest as provided by law and taxable costs of suit;
- 10 2. **IT IS FURTHER ORDERED** that, as to Helix's Claim for violations of NRS 338
11 against APCO, this Court finds in favor of Helix in the amount of \$1,960.85;
- 12 3. **IT IS FURTHER ORDERED** that, as to Helix's Motion for Attorney's Fees, Costs
13 and Interest, after careful consideration of the parties' briefing and the *Brunzell*² factors,
14 the Court awards Helix attorney's fees for the work provided by Cary B. Domina, Esq.,
15 Ronald J. Cox, Esq., and Terri Hansen only, in the amount of \$149,336.06, as the Court
16 believes the remaining requested fees were duplicative and should not be awarded. The
17 Court finds that the amount awarded is reasonable considering the qualifications of
18 Helix's counsel, the character of the work performed, the number of dispositive motions
19 filed in this matter that Helix successfully defended itself against, as well as the
20 favorable result obtained by Helix at trial.
- 21 4. **IT IS FURTHER ORDERED** that, the Court awards Helix its costs in the amount of
22 \$8,949.40, and interest in the amount of \$14,927.58.
- 23 5. **IT IS FURTHER ORDERED** that Judgment is hereby entered in favor of Helix and
24 against APCO and Safeco in the total amount of **\$219,166.28**.

25 ///

26 ///

27 ///

28 ¹ The Court's Findings of Fact and Conclusions of Law are incorporated herein to support the Court's Final Judgment.

² See *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

1 6. Any claim not otherwise disposed of by this decision is dismissed.

2 **IT IS SO ORDERED**

3 Dated this ____ day of October, 2019.

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DISTRICT COURT JUDGE

Approved as to Form and Content:

FENNEMORE CRAIG P.C.

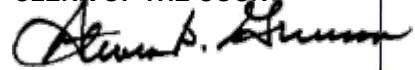
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Attorneys for Plaintiff
Helix Electric of Nevada, LLC

Exhibit 7

Exhibit 7



1 **NEOJ**
2 CARY B. DOMINA, ESQ.
3 Nevada Bar No. 10567
4 JEREMY HOLMES, ESQ.
5 Nevada Bar No. 14379
6 **PEEL BRIMLEY LLP**
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13 *Attorneys for Plaintiff*
14 *Helix Electric of Nevada, LLC*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 HELIX ELECTRIC OF NEVADA, LLC, a
11 Nevada limited liability company,

CASE NO. : A-16-730091-C
DEPT. NO. : XI

12 Plaintiff,

13 vs.

14 APCO CONSTRUCTION, a Nevada corporation;
15 SAFECO INSURANCE COMPANY OF
16 AMERICA; DOES I through X; and BOE
17 BONDING COMPANIES I through X,


Defendants.

18 **NOTICE OF ENTRY OF FINAL JUDGMENT**

19 PLEASE TAKE NOTICE that a Final Judgment entered November 4, 2019 and filed on
20 **November 6, 2019**, a copy of which is attached as Exhibit 1.

21 Dated this 6th day of November, 2019.

22 **PEEL BRIMLEY LLP**

23 
24 CARY B. DOMINA, ESQ. (10567)
25 JEREMY HOLMES, ESQ. (14379)
26 3333 E. Serene Avenue, Suite 200
27 Henderson, Nevada 89074-6571
28 Telephone: (702) 990-7272
Attorneys for Plaintiff
Helix Electric of Nevada, LLC

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3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 14 day of November, 2019, I caused the above and foregoing document, **NOTICE OF ENTRY OF FINAL JUDGMENT**, to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☒ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____

to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

Attorneys for APCO Construction and Safeco Insurance Co.
John Randall Jefferies, Esq. (rjefferies@fclaw.com)
Brandi M. Planet, Esq. (bplanet@fclaw.com)



An employee of **PEEL BRIMLEY, LLP**

EXHIBIT 1

ORIGINAL

Electronically Filed
11/6/2019 10:22 AM
Steven D. Grierson
CLERK OF THE COURT

Steven D. Grierson

1 **JUDG**
2 CARY B. DOMINA, ESQ.
3 Nevada Bar No. 10567
4 RONALD J. COX, ESQ.
5 Nevada Bar No. 12723
6 JEREMY HOLMES, ESQ.
7 Nevada Bar No. 14379
8 **PEEL BRIMLEY LLP**
9 3333 E. Serene Avenue, Suite 200
10 Henderson, Nevada 89074-6571
11 Telephone: (702) 990-7272
12 Facsimile: (702) 990-7273
13 cdomina@peelbrimley.com
14 rcox@peelbrimley.com
15 jholmes@peelbrimley.com
16 *Attorneys for Plaintiff*
17 *Helix Electric of Nevada, LLC*

18 **DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

20 HELIX ELECTRIC OF NEVADA, LLC, a
21 Nevada limited liability company,

22 Plaintiff,

23 vs.

24 APCO CONSTRUCTION, a Nevada corporation;
25 SAFECO INSURANCE COMPANY OF
26 AMERICA; DOES I through X; and BOE
27 BONDING COMPANIES I through X,

28 Defendants.

CASE NO. : A-16-730091-B
DEPT. NO. : XI

FINAL JUDGMENT

29 This matter having come before the Honorable Elizabeth Gonzalez on for a non-jury trial
30 beginning on June 3, 2019, and continuing day to day, until its completion on June 5, 2019; Plaintiff
31 HELIX ELECTRIC OF NEVADA, LLC ("Helix"), was represented by and through its counsel,
32 Cary B. Domina, Esq. and Ronald J. Cox, Esq., of the law firm of Peel Brimley LLP, and
33 Defendants APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF
34 AMERICA ("Safeco"), were represented by and through their counsel, Randy Jeffries, Esq. of
35 Fennemore Craig; the Court having read and considered the pleadings filed by the parties; having
36 reviewed the evidence admitted during the trial; having heard and carefully considered the

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1 testimony of the witnesses called to testify; having considered the oral and written arguments of
2 counsel, and with the intent of rendering a decision on all remaining claims before the Court
3 pursuant to NRCP 52(a) and 58, the Court hereby enters its Final Judgment pursuant to the Court's
4 Findings of Fact and Conclusions of Law¹ and the Court's ruling on Helix's Motion for Fees, Costs
5 and Interest as follows:

- 6 1. **IT IS HEREBY ORDERED** that, as to Helix's Claims for Breach of Contract and
7 Breach of the Implied Covenant of Good Faith and Fair Dealing against APCO, this
8 Court finds in favor of Helix and awards damages in the amount of \$43,992.39 together
9 with interest as provided by law and taxable costs of suit;
- 10 2. **IT IS FURTHER ORDERED** that, as to Helix's Claim for violations of NRS 338
11 against APCO, this Court finds in favor of Helix in the amount of \$1,960.85;
- 12 3. **IT IS FURTHER ORDERED** that, as to Helix's Motion for Attorney's Fees, Costs
13 and Interest, after careful consideration of the parties' briefing and the *Brunzell*² factors,
14 the Court awards Helix attorney's fees for the work provided by Cary B. Domina, Esq.,
15 Ronald J. Cox, Esq., and Terri Hansen only, in the amount of \$149,336.06, as the Court
16 believes the remaining requested fees were duplicative and should not be awarded. The
17 Court finds that the amount awarded is reasonable considering the qualifications of
18 Helix's counsel, the character of the work performed, the number of dispositive motions
19 filed in this matter that Helix successfully defended itself against, as well as the
20 favorable result obtained by Helix at trial.
- 21 4. **IT IS FURTHER ORDERED** that, the Court awards Helix its costs in the amount of
22 \$8,949.40, and interest in the amount of \$14,927.58.
- 23 5. **IT IS FURTHER ORDERED** that Judgment is hereby entered in favor of Helix and
24 against APCO and Safeco in the total amount of **\$219,166.28**.

25 ///

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27 ///

28 ¹The Court's Findings of Fact and Conclusions of Law are incorporated herein to support the Court's Final Judgment.
² See *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

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6. Any claim not otherwise disposed of by this decision is dismissed.


IT IS SO ORDERED

Dated this 4 day of ^{November} ~~October~~, 2019.


DISTRICT COURT JUDGE

Approved as to Form and Content:

FENNEMORE CRAIG P.C.


John Randall Jeffries, Esq. (SBN 3512)
Brandi M. Planet, Esq. (SBN 11710)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Phone: (702) 692-8000
Attorneys for Defendants
APCO Construction and Safeco
Insurance Company of America

Submitted by:

PEEL BRIMLEY LLP

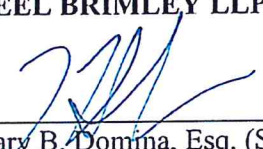

Cary B. Domina, Esq. (SBN 10567)
Ronald J. Cox, Esq. (SBN 12723)
Jeremy D. Holmes Esq. (SBN 14379)
3333 E. Serene Avenue, Suite 200
Henderson, NV 89074-6571
Phone: (702) 990-7272
Attorneys for Plaintiff
Helix Electric of Nevada, LLC

Exhibit 8

Exhibit 8



1 **NOA**

2 John Randall Jefferies, Esq. (Bar No. 3512)
3 Brandi M. Planet, Esq. (Bar No. 11710)
4 Christopher H. Byrd, Esq. (Bar No. 1633)
5 FENNEMORE CRAIG, P.C.
6 300 S. Fourth Street, Suite 1400
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9 Facsimile: (702) 692-8099
10 E-mail: rjefferies@fclaw.com
11 bplanet@fclaw.com
12 cbyrd@fclaw.com

13 *Attorneys for APCO Construction, Inc.*
14 *and Safeco Insurance Company of America*

Electronically Filed
Dec 10 2019 11:57 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 HELIX ELECTRIC OF NEVADA, LLC, a Case No.: A-16-730091-B
18 Nevada limited liability company,
19
20 Plaintiff,
21

22 v.

23 **NOTICE OF APPEAL**

24 APCO CONSTRUCTION, a Nevada
25 corporation; SAFECO INSURANCE
26 COMPANY OF AMERICA; DOES I through X;
27 and BOE BONDING COMPANIES, I through
28 X.

Defendants.

NOTICE IS HEREBY GIVEN that Defendants APCO Construction, Inc. and Safeco Insurance Company of America in the above-captioned action, hereby appeal to the Supreme Court of Nevada from the following:

A. Final Judgment, written notice of entry of which was given November 6, 2019; the Findings of Fact and Conclusions of Law incorporated by reference in the Final Judgment, written notice of entry of which was given on July 10, 2019; both of which are attached as Exhibit "1"; and all orders prior to the entry of the Final Judgment, including but not limited to the following:

1. Denial of Appellants' Omnibus Motion in Limine 1-2;

2. Denial of Appellants' Motion in Limine No. 3 to Preclude the Introduction of Evidence Related to Helix's Extended General Conditions and Motion in Limine No. 4 to Preclude Any Evidence of Helix's Accounting Data or Job Cost Reports;
3. Denial of Appellants' Motion to Exclude the Testimony of Kurt Williams;
4. Denial of Appellants' Motion for Clarification and or Amendment of Findings of fact and Conclusions of Law; and
5. Grant of Respondent's Motion for Attorneys' Fees, Costs and Interest,

Dated this 6th day of December, 2019.

FENNEMORE CRAIG, P.C.

/s/ John Randall Jefferies

John Randall Jefferies, Esq. (Bar No. 3512)

Brandi M. Planet, Esq. (Bar No. 11710)

Christopher H. Byrd, Esq. (Bar No. 1633)

Attorneys for APCO Construction, Inc.

and Safeco Insurance Company of America

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of Fennemore Craig, P.C., and further certify that
3 the **NOTICE OF APPEAL** was served by electronic filing via Odyssey File & Serve e-filing
4 system and serving all parties with an email address on record, pursuant to the Administrative
5 Order 14-2 and Rule 9 N.E.F.C. as follows:

6 **Other Service Contacts:**

7 Amanda Armstrong aarmstrongatpeelbrimley.com

Cary B. Domina cdominaatpeelbrimley.com

8 Rosey Jeffrey rjeffreyatpeelbrimley.com

9 Terri Hansen thansenatpeelbrimley.com

Chelsie A. Adams cadamsatfclaw.com

10 Mary Bacon mbaconatspencerfane.com

Trista Day tdayatfclaw.com

11 Jeremy Holmes jholmesatpeelbrimley.com

Laura Hougard LHougardatfclaw.com

12 John Randy Jefferies rjefferiesatfclaw.com

13 Cheryl Landis clandisatfclaw.com

Adam Miller amilleratspencerfane.com

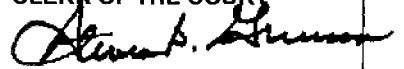
14 Brandi Planet bplanetatfclaw.com

Kassi Rife KRifeatfclaw.com

15 Dated this 6th day of December, 2019.

16
17 /s/ Trista Day
An Employee of Fennemore Craig, P.C.

Exhibit 1



1 **NEOJ**
2 CARY B. DOMINA, ESQ.
3 Nevada Bar No. 10567
4 JEREMY HOLMES, ESQ.
5 Nevada Bar No. 14379
6 **PEEL BRIMLEY LLP**
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12 jholmes@peelbrimley.com
13 *Attorneys for Plaintiff*
14 *Helix Electric of Nevada, LLC*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 HELIX ELECTRIC OF NEVADA, LLC, a
11 Nevada limited liability company,

CASE NO. : A-16-730091-C
DEPT. NO. : XI

12 Plaintiff,

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CERTIFICATE OF SERVICE

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- ☐ pursuant to EDCR 7.26, to be sent via **facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____

to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

Attorneys for APCO Construction and Safeco Insurance Co.

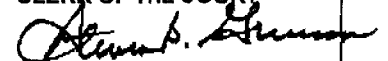
John Randall Jefferies, Esq. (rjefferies@fclaw.com)

Brandi M. Planet, Esq. (bplanet@fclaw.com)



An employee of **PEEL BRIMLEY, LLP**

EXHIBIT 1



JUDG

CARY B. DOMINA, ESQ.

Nevada Bar No. 10567

RONALD J. COX, ESQ.

Nevada Bar No. 12723

JEREMY HOLMES, ESQ.

Nevada Bar No. 14379

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jholmes@peelbrimley.com

Attorneys for Plaintiff

Helix Electric of Nevada, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

HELIX ELECTRIC OF NEVADA, LLC, a
Nevada limited liability company,

Plaintiff,

vs.

APCO CONSTRUCTION, a Nevada corporation;
SAFECO INSURANCE COMPANY OF
AMERICA; DOES I through X; and BOE
BONDING COMPANIES I through X,

Defendants.

CASE NO. : A-16-730091-B
DEPT. NO. : XI

FINAL JUDGMENT

This matter having come before the Honorable Elizabeth Gonzalez on for a non-jury trial beginning on June 3, 2019, and continuing day to day, until its completion on June 5, 2019; Plaintiff HELIX ELECTRIC OF NEVADA, LLC ("Helix"), was represented by and through its counsel, Cary B. Domina, Esq. and Ronald J. Cox, Esq., of the law firm of Peel Brimley LLP, and Defendants APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF AMERICA ("Safeco"), were represented by and through their counsel, Randy Jeffries, Esq. of Fennemore Craig; the Court having read and considered the pleadings filed by the parties; having reviewed the evidence admitted during the trial; having heard and carefully considered the

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1 testimony of the witnesses called to testify; having considered the oral and written arguments of
2 counsel, and with the intent of rendering a decision on all remaining claims before the Court
3 pursuant to NRCP 52(a) and 58, the Court hereby enters its Final Judgment pursuant to the Court's
4 Findings of Fact and Conclusions of Law¹ and the Court's ruling on Helix's Motion for Fees, Costs
5 and Interest as follows:

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7 Breach of the Implied Covenant of Good Faith and Fair Dealing against APCO, this
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24 against APCO and Safeco in the total amount of **\$219,166.28**.

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² See *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

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6. Any claim not otherwise disposed of by this decision is dismissed.


IT IS SO ORDERED

Dated this 4 day of ^{November}~~October~~, 2019.


DISTRICT COURT JUDGE

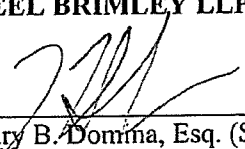
Approved as to Form and Content:

FENNEMORE CRAIG P.C.


John Randall Jeffries, Esq. (SBN 3512)
Brandi M. Planet, Esq. (SBN 11710)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Phone: (702) 692-8000
Attorneys for Defendants
APCO Construction and Safeco
Insurance Company of America

Submitted by:

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ORIGINAL

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JUDG

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Helix Electric of Nevada, LLC

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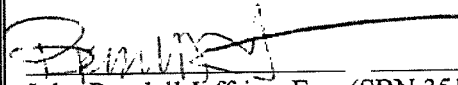
IT IS SO ORDERED

Dated this 4 day of ~~October~~^{November}, 2019.


DISTRICT COURT JUDGE

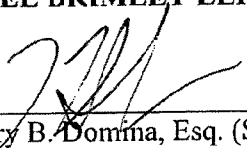
Approved as to Form and Content:

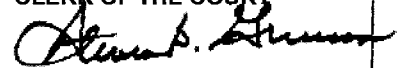
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Submitted by:

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16 *Attorneys for Plaintiff*
17 *HELIX ELECTRIC OF NEVADA, LLC*

18 **DISTRICT COURT**
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28 Defendants.

CASE NO. : A-16-730091-C
DEPT. NO. : XI

**NOTICE OF ENTRY OF FINDINGS
OF FACT AND CONCLUSIONS OF
LAW AND ORDER**

///

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NOTICE OF ENTRY OF FINDINGS
OF FACT AND CONCLUSIONS OF LAW AND ORDER

PLEASE TAKE NOTICE that the **FINDINGS OF FACT AND CONCLUSIONS OF
LAW AND ORDER** was filed on **July 8, 2019**, a copy of which is attached as Exhibit 1.

Dated this 10th day of July, 2019.

PEEL BRIMLEY LLP



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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 10th day of July, 2019, I caused the above and foregoing document, **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER**, to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☒ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____

to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

Attorneys for APCO Construction and Safeco Insurance Co.
John Randall Jefferies, Esq. (rjefferies@fclaw.com)
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An employee of **PEEL BRIMLEY, LLP**

EXHIBIT 1



1 FFCL

2
3 DISTRICT COURT

4 CLARK COUNTY, NEVADA

5 HELIX ELECTRIC OF NEVADA, LLC, a
6 Nevada limited liability company,

7 Plaintiff,

8 v.

9
10 APCO CONSTRUCTION, a Nevada
11 corporation; SAFECO INSURANCE
12 COMPANY OF AMERICA; DOES I through
13 X; and BOE BONDING COMPANIES, I
14 through X,

15 Defendants.

Case No.: A-16-730091-C

Dept.: XI

16 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

17 This matter having come on for non-jury trial before the Honorable Elizabeth Gonzalez
18 beginning on June 3, 2019, and continuing day to day, until its completion on June 5, 2019;
19 Plaintiff, HELIX ELECTRIC OF NEVADA, LLC ("Helix"), was represented by and through its
20 counsel, Cary B. Domina, Esq. and Ronald J. Cox, Esq. of the law firm of Peel Brimley LLP, and
21 Defendants, APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF
22 AMERICA ("Safeco"), were represented by and through their counsel, Randy Jefferies, Esq. of
23 Fennemore Craig; the Court having read and considered the pleadings filed by the parties; having
24 reviewed the evidence admitted during the trial; having heard and carefully considered the
25 testimony of the witnesses called to testify; having considered the oral and written arguments of
26 counsel, and with the intent of rendering a decision on all remaining claims before the Court,

RECEIVED

JUL 08 2019

CLERK OF THE COURT

1 pursuant to NRCP 52(a) and 58;¹ the Court makes the following findings of fact and conclusions
2 of law:

3 FINDINGS OF FACT

4 1. In July 2011, APCO submitted a bid for the Craig Ranch Regional Park – Phase II
5 - Project No. 10294 (“Project”) to the City of North Las Vegas (“CNLV”). At that time, the
6 anticipated Project duration was approximately 550 calendar days.
7

8 2. Helix submitted a bid of approximately \$4,600,000 to APCO for the electrical
9 work required on the Project. Helix’s estimate assumed a Project duration of 550 days.

10 3. CNLV canceled the original solicitation and ultimately requested a second round
11 of bids in October 2011. Among other things, CNLV changed the duration of the Project from 18
12 months to 12 months.
13

14 4. On or about October 26, 2011, APCO submitted its second bid to CNLV for the
15 Project with a 12-month schedule.

16 5. CNLV issued its notice to proceed to APCO on January 11, 2012. APCO started
17 work on the Project on approximately January 16, 2012.

18 6. Helix mobilized its equipment and started work full time on or about February 20,
19 2012.
20

21 7. In the spring of 2012, APCO entered into a construction agreement (the “Prime
22 Contract”) with the CNLV in which APCO agreed to serve as the general contractor on the
23 Project.

24 8. Section 6.3.2 the General Conditions of the Prime Contract which are incorporated
25 into the Subcontract, states in part:
26

27 ¹ In the pretrial statement, the parties have stipulated that the Contract time was extended from January 2013
28 into November 2013 through no fault of either APCO or Helix.

1 [a]ll other claims notices for extra work shall be filed in writing to the Construction
2 Manager prior to the commencement of such work. Written notices shall use the words
3 "Notice of Potential Claim." Such Notice of Potential Claim shall state the circumstances
4 and all reasons for the claim, but need not state the amount.

5 9. After receiving the notice of proposed award, APCO agreed to contract terms with
6 Helix subject to certain specially negotiated terms modifying the form subcontract ("Helix
7 Addendum").

8 10. As part of the negotiation, APCO agreed to purchase certain materials totaling
9 \$2,248,248 as specified by Helix, which was to be removed from Helix's original proposed scope
10 and pricing.

11 11. Helix entered into an agreement with APCO to provide certain electrical related
12 labor, materials and equipment (the "Work") to the Project for the lump sum amount of
13 \$2,356,520.

14 12. On or about April 19, 2012, APCO and Helix entered into a formal subcontract for
15 the electrical work required on the Project (the "Subcontract").

16 13. Helix's Daily Reports, Certified Pay Roll Records and the Project Sign-in Sheets
17 establish that Helix started performing work for the Project as early as January 23, 2012, and
18 mobilized on the Project on or about February 28, 2012.

19 14. Pursuant to Exhibit "A" of the Subcontract, Helix was required to supply "all
20 labor, materials, tools, equipment, hoisting, forklift, supervision, management, permits and taxes
21 necessary to complete all of the scope of work" for the 'complete electrical package' for the
22 Project.
23

24 15. Section 6.5 contains a "no damage for delay" provision.

25 If Subcontractor shall be delayed in the performance of the Work by any act or neglect of
26 the Owner or Architect, or by agents or representatives of either, or by changes ordered in
27 the Work, or by fire, unavoidable casualties, national emergency, or by any cause other
28 that [SIC] the intentional Interference of Contractor, Subcontractor shall be entitled, as
Subcontractor's exclusive remedy, to an extension of time reasonably necessary to

1 compensate for the time lost due to the delay, but only if Subcontractor shall notify
2 Contractor in writing within twenty four (24) hours after such occurrences, and only if
3 Contractor shall be granted such time extension by Owner.

4 This clause was not modified by the Helix Addendum.

5 16. Section 6.7 of the Subcontract provided in pertinent part:

6 Contractor shall not be liable to Subcontractor for delays caused by reason of fire or other
7 casualty, or on account of riots, strikes, labor trouble, terrorism, acts of God, cataclysmic
8 event, or by reason of any other event or cause beyond Contractor's control, or
9 contributed to by Subcontractor.

10 Section 6.7 was not modified by the Helix Addendum.

11 17. The Parties Contract requires proof of actual cost increase. Section 7.1—which
12 was unchanged by the Helix Addendum—provides:

13 Contractor may order or direct changes, additions, deletions or other revisions in the
14 Subcontract work without invalidating the Subcontract. No changes, additions, deletions,
15 or other revisions to the Subcontract shall be valid unless made in writing. Subcontractor
16 markup shall be limited to that stated in the contract documents in addition to the
17 direct/actual on-site cost of the work, however, no profit and overhead markup on
18 overtime shall be allowed.

19 18. Section 7.2 as modified by the Helix Addendum, provided:

20 Subcontractor, prior to the commencement of such changed or revised work, shall submit,
21 (within 5 days of Contractor's written request) to Contractor, written copies of the
22 breakdown of cost or credit proposal, including work schedule revisions, for changes,
23 additions, deletions, or other revisions in a manner consistent with the Contract
24 Documents. Contractor shall not be liable to Subcontractor for a greater sum, or
25 additional time extensions, than Contractor obtains from Owner for such additional work.

26 19. The parties negotiated additional language that was included in Section 6 by the
27 Helix Addendum:

28 In the event the schedule as set forth above is changed by Contractor for whatever reason
so that Subcontractor either is precluded from performing the work in accordance with
said schedule and thereby suffers delay, or, is not allowed the number of calendar days to
perform the work under such modified schedule and must accelerate its performance, then
Subcontractor shall be entitled to receive from Contractor payment representing the costs
and damages sustained by Subcontractor for such delay or acceleration, providing said
costs and damages are first paid to Contractor.

20. Section 4.4 of the Subcontract—as amended by the Helix Addendum provides:

1 Progress payments will be made by Contractor to Subcontractor within 10 calendar days
2 after Contractor actually receives payment for Subcontractor's work from Owner. The
3 progress payment to Subcontractor shall be one hundred percent (100%) of the value of
4 Subcontract work completed (less 10% retention) during the preceding month as
5 determined by the Owner, less such other amounts as Contractor shall determine as being
6 properly withheld as allowed under this Article or as provided elsewhere in this
7 Subcontract. The estimates of Owner as to the amount of Work completed by
8 Subcontractor shall be binding upon Contractor and Subcontractor and shall conclusively
9 establish the amount of Work performed by Subcontractor. As a condition precedent to
10 receiving partial payments from Contractor for Work performed, Subcontractor shall
11 execute and deliver to Contractor, with its application for payment, a full and complete
12 release (Forms attached) of all claims and causes of action Subcontractor may have
13 against Contractor and Owner through the date of the execution of said release, save and
14 except those claims specifically listed on said release and described in a manner sufficient
15 for Contractor to identify such claim or claims with certainty. Upon the request of
16 Contractor, Subcontractor shall provide an Unconditional Waiver of Release in form
17 required by Contractor for any previous payment made to Subcontractor. Any payments
18 to Subcontractor shall be conditioned upon receipt of the actual payments by Contractor
19 from Owner. Subcontractor herein agrees to assume the same risk that the Owner may
20 become insolvent that Contractor has assumed by entering into the Prime Contract with
21 the Owner per NRS Statutes.

22 21. The Subcontract also incorporated the Prime Contract, which included the claim
23 procedures set forth in the Contract.

24 22. Helix assigned Kurk Williams as its Project Manager. Williams never signed in
25 using APCO's sign in sheets that were maintained at the Project site. By his own admission,
26 Williams' time devoted to the Project was not accurately tracked in Helix's certified payroll
27 reports, only Helix's job cost report.

28 23. Richard Clement was Helix's Project Superintendent. Clement was on site
occasionally and signed in with APCO at the Project twice during 2012.

24 24. Clement did not work on the Project between June 11, 2012 and September 26,
25 2012. Clement only worked two weeks on the Project from September 27, 2012 to October 7,
26 2012. Clement did not work on the Project from October 8, 2012 through January 20, 2013. In
27 all of 2013, which was the extended Project time, Clement only worked 32 hours during the week
28 ending January 27, 2013.

1 25. In late January 2013, Helix assigned Clement to another project and designated
2 Rainer Prietzel, Helix's Foreman to oversee work in the field, as the new Project Superintendent
3 and foreman.

4 26. According to the Labor Commissioner, and OSHA regulations, Helix must always
5 have a project superintendent on site at all times during the Project.
6

7 27. From January 2013 to May 2013, Helix typically had a three to five man crew on
8 the Project.

9 28. In early May 2013, with the exception of a few days, Prietzel was the only Helix
10 employee on the Project, and he split his time as the Project Superintendent and self-performing
11 contract and change order work on the Project.

12 29. Prietzel remained the Project Superintendent until the end of the Project in mid-
13 October 2013.
14

15 30. Helix's original line item for its general conditions, as reflected in its pay
16 application, was \$108,040 on a Subcontract price of \$2,380,085, which represents 4.5%.

17 31. The Project encountered significant delays and was not substantially completed
18 until October 25, 2013, thus resulting in Helix claiming approximately, \$138,000 in additional
19 extended overhead costs.

20 32. The project was never abandoned by CNLV.
21

22 33. Prior to the original project completion date passing, on January 9, 2013, APCO
23 submitted its first request for an extension of time to CNLV. APCO submitted its Time Impact
24 Analysis #1 ("TIA #1") to CNLV where it sought extended general conditions and home office
25 overhead of \$418,059 (\$266,229 for general conditions and \$151,830 for home office overhead).

26 34. Helix first notified APCO in writing that it would be asserting a claim for extended
27 overhead costs on January 28, 2013 and reserved its rights to submit a claim for "all additional
28

1 costs incurred due to scheduled delays for this project" (the "Claim").

2 35. As of May 9, 2013, CNLV had not made a decision on APCO's TIA #1.

3 36. On May 9, 2013, APCO submitted a revised Time Impact Analysis ("TIA #2") to
4 CNLV seeking an additional five (5) months of compensation for general conditions and home
5 office overhead, among other claims, for a total delay claim of nine (9) months.
6

7 37. As part of TIA #2, APCO submitted Change Order Request No. 39.1 to CNLV
8 seeking compensation of \$752,499 for its extended general conditions and home office overhead
9 (\$479,205 for general conditions and \$273,294 for home office overhead).

10 38. This represented approximately seventy percent (70%) of APCO's \$1,090,066.50
11 total claim against CNLV for the 9-month delay to the Project.

12 39. APCO's claim did not include any amounts for its subcontractors, and APCO
13 acknowledges that as a company policy, it does not include its subcontractors' claims with its
14 own claims.
15

16 40. Through no fault of APCO, Helix did not take delivery of various light poles and
17 related equipment until approximately January 30, 2013.

18 41. On June 19, 2013, APCO and Helix exchanged emails regarding various Project
19 issues, including Helix's delay rates. APCO confirmed that if Helix submitted a request for
20 compensation that it would be forwarded to CNLV.
21

22 42. On June 19, 2013 Helix provided a supplemental notice of claim but did not
23 provide any back up to support its daily rates or the impacts alleged to be attributed to the delay.
24 At that time, Helix still only had Prietzel working on site.

25 43. On June 21, 2013 Helix and APCO exchanged emails related to the support for
26 Helix's claimed costs, with APCO noting that a project manager was considered home office
27 overhead. Helix indicated that its job cost reports would reflect the actual costs for the extended
28

1 overhead.

2 44. In June 2013, Helix realized the Project was still several months away from being
3 completed. According to Helix's June 19 letter entitled "Extended overhead cost", Helix's cost
4 for extended overhead was \$640/day.

5 45. The \$640/day cost is comprised of (1) \$260 for the Project Manager; (2) \$280 for
6 the Superintendent; (3) \$25 for the site trailer; (4) \$5 for the Connex box; (5) \$25 for the forklift;
7 and (6) \$45 for the truck.

8 46. The email that accompanied Helix's June 19, 2013 letter advised APCO that to
9 date, Helix's Claim totaled \$72,960, but that Helix's Claim would increase for each day the
10 Project continued past the original completion date.

11 47. Also on June 19, 2013, APCO informed Helix, by way of an email, that it "is in
12 the process of presenting CNLV with a Time Impact Analysis containing facts as to why the
13 additional costs should be paid." APCO had submitted TIA #2 to CNLV on May 9, 2013, six
14 weeks prior to this email.

15 48. In the email, APCO further advised Helix that "[o]nce we fight the battle, and
16 hopefully come out successfully, this will open the door for Helix...to present their case for the
17 same."

18 49. While APCO notified Helix that it would forward to CNLV any letter Helix
19 provided regarding its claim for extended overhead costs, APCO did not inform Helix that it
20 needed Helix's Claim immediately so it could include it with APCO's claim to CNLV. Indeed,
21 according to APCO, it would first "fight that battle, and hopefully come out successfully..."
22 which would only then "open the door for Helix...to present their case..."

23 50. On August 27, 2013, despite the fact that the Project was still ongoing, Helix
24 furnished APCO with its first invoice for its Claim in the amount of \$102,400, which constituted
25
26
27
28

1 32 weeks of extended overhead costs incurred between January 13, 2013, and August 30, 2013
2 (or 160 business days).

3 51. Helix's invoice identified an extended overhead cost of \$640/day for 32 weeks,
4 which had been provided to APCO in June 2013.

5 52. From May 6, 2013 through November 6, 2013, Prietzel was the only Helix person
6 on site. Prietzel confirmed that during that time period he was either working on completing
7 original Subcontract work for which Helix would be paid or change order work that was
8 acknowledged and paid by APCO and CNLV.
9

10 53. During construction, CNLV made changes or otherwise caused issues that
11 impacted Helix. In those instances, Helix submitted a request for additional compensation and
12 CNLV issued APCO change orders that compensated Helix for the related impacts. During the
13 extended Contract time, CNLV issued eleven change orders that resulted in additional
14 compensation to Helix through the Subcontract. Helix's pricing for the change orders included a
15 10% markup on materials and a 15% markup on labor to cover Helix's overhead.
16

17 54. APCO submitted Change Order Request No. 68 ("COR 68") to CNLV on
18 September 9, 2013, requesting compensation for Helix's Claim.

19 55. On September 16, 2013, CNLV rejected the COR 68 stating, "This COR is
20 REJECTED. The City of North Las Vegas does not have a contract with Helix Electric."
21

22 56. CNLV stated that it did not reject COR 68 for lack of backup or untimeliness.

23 57. The Construction Manager for CNLV during the Project, Joemel Llamado,
24 testified that the only reason he rejected Helix's Claim was because CNLV did not have a
25 contract with Helix. APCO should have included Helix's Claim in its own claim to CNLV since
26 Helix's Subcontract was with APCO, not CNLV.

27 58. Llamado did not look at the merits of the Claim because the Claim should have
28

1 been included with APCO's claim.

2 59. APCO informed Helix that CNLV rejected COR 68 because of lack of backup
3 documentation.

4 60. On October 2, 2013, CNLV issued its decision on APCO's request for additional
5 time and compensation. CNLV determined that the time period from January 11, 2013 to May
6 10, 2013 was an excusable but not compensable delay. APCO was not charged liquidated
7 damages, but also was not provided compensation from January thru May 10, 2013. CNLV did
8 confirm that it would pay APCO \$560,724.16 for the delay from May 10, 2013 to October 25,
9 2013. APCO accepted that determination on or about October 10, 2013.

10 61. On October 3, 2013, APCO sent Helix a letter requesting additional back-up
11 documentation for the Claim so it could resubmit the Claim to CNLV.

12 62. That letter states in relevant part:

13
14 Attached is your invoice of August 27, 2013 in the amount of \$102,400. At this time
15 APCO has not received any back-up documentation to undo the previous formal rejection
16 made by the City of North Las Vegas. If you want APCO to re-submit your request,
17 please provide appropriate back-up for review.

18 63. On October 2, 2013, CNLV and APCO entered into a settlement agreement
19 through which CNLV agreed to pay APCO \$560,724.16 for its claim submitted under TIA #2,
20 including APCO's claim for added overhead and general conditions it incurred as a result of the
21 nine-month delay to the Project.

22 64. According to that settlement agreement, APCO agreed to "forgo any claims for
23 delays, disruptions, general conditions and overtime costs associated with the weekend work
24 previously performed...and for any other claim, present or future, that may occur on the project.

25 65. APCO did not notify Helix that it had entered into this settlement agreement.

26 66. Llamado's position was that the settlement agreement resolved any and all claims
27 between CNLV and APCO for the nine-month delay to the Project, including any claims APCO's
28

1 subcontractors might have.²

2 67. Pursuant to this settlement agreement, CNLV issued Change Order No. 50 to
3 APCO and agreed to pay APCO \$560,724.16 for the added overhead and general conditions it
4 incurred as a result of the extended project completion date.

5 68. On October 3, 2013, APCO transmitted to Helix CNLV's rejection of its invoice
6 for extended overhead.

7 69. Near the end of the Project in October 2013, Pelan, notified Helix, that Helix could
8 not include the Claim for extended overhead in Helix's pay application for retention because
9 CNLV would not release the retention on the Project if there were outstanding Claims on the
10 Project.

11 70. In compliance with Pelan's instructions, on October 18, 2013, Helix submitted its
12 Pay Application for Retention only in the amount of \$105,677.01 and identified it as Pay
13 Application No. 161113-002 (the "Retention Pay App").

14 71. On October 18, 2013, Helix submitted its pay application for the time period up
15 through October 30, 2013. At that time, Helix billed its general conditions line item at 100%.

16 72. On October 18, 2013, Helix submitted its pay application for the release of
17 retention. As with prior pay applications, Helix enclosed a conditional waiver. The release was
18 conditioned on APCO issuing a final payment in the amount of \$105,677.01 and expressly
19 confirmed that there were "zero" claims outstanding. Helix signed and provided that release to
20 APCO after receiving CNLV's rejection of its extended overhead invoice.

21 73. Helix also provided to APCO a "Conditional Waiver and Release Upon Final
22 Payment" (the "Conditional Waiver") for the Retention Pay App only (i.e. Pay App No. 161113-
23

24
25
26
27 ² Joe Pelan, the Contract Manager for APCO, disagreed with this position, but APCO and Helix did not test it
28 through the claims process provided in the Prime Contract.

1 002).

2 74. Helix indicated in the Conditional Waiver that there was no "Disputed Claim
3 Amount" relating to the Retention Pay App.

4 75. Helix takes the position that the Conditional Waiver was not intended to release
5 Helix's Claim.
6

7 76. The evidence presented at trial of the circumstances surrounding the execution of
8 the Conditional Waiver do not support Helix's waiver of the Claim.

9 77. It took APCO more than a year to pay Helix for its Retention Pay App, during
10 which time, Helix made it clear to APCO that it would continue pursuing its Claim.

11 78. Between October 2013 and the end of October 2014 when APCO finally paid
12 Helix its retention, APCO forwarded Helix's Claim to CNLV on two separate occasions and
13 received multiple written notices from Helix that it maintained its Claim against APCO.
14

15 79. The project was substantially completed on October 25, 2013.

16 80. On October 31, 2013, in order to account for certain overhead items that were
17 omitted from the original Claim, Helix: (i) increased its Claim from \$102,400 to \$111,847; (ii)
18 resubmitted its Invoice to APCO; and (iii) provided additional backup information and
19 documents. Included with the revised invoice was a monthly breakdown of Helix's Claim from
20 January to August, which included the following categories of damages: (1) Project Manager; (2)
21 Project Engineer; (3) Superintendent; (4) Site trucks; (5) Project Fuel; (6) Site Trailer; (7) Wire
22 Trailer; (8) Office supplies; (9) Storage Connex boxes; (10) forklifts; (11) small tools; and (12)
23 consumables. According to the summary of the Claim, Helix charged the Project 4-hours a day
24 for its Project Manager, Kurk Williams at \$65/hour, and 4-hours a day for its Superintendent, Ray
25 Prietzel at \$70/day.
26

27 81. On or about November 5, 2013, three weeks after APCO received Helix's
28

1 Retention Pay App and Conditional Waiver, APCO submitted a revised COR 68 (68.1) to CNLV
2 seeking a total of \$111,847 for Helix's Claim.

3 82. Had APCO believed Helix's Conditional Waiver for the Retention Pay App
4 (received on October 18, 2013) waived any and all claims Helix had on the Project, including its
5 Claim for extended overhead, APCO would not have submitted revised COR 68.1 to CNLV three
6 weeks after receiving Helix's Conditional Waiver.
7

8 83. On November 18, 2013, CNLV again rejected the Change Order Request stating,
9 "This is the 2nd COR for Helix Electric's extended overhead submittal. The 1st one was submitted
10 on Sept. 9, 2013 and Rejected on Sept. 16, 2013. This submittal dated Nov. 5, 2013 is
11 REJECTED on Nov. 13, 2013."

12 84. Llamado's second rejection had nothing to do with lack of backup documents or
13 untimeliness and was rejected simply because APCO should have included Helix's Claim under
14 its own claim to CNLV.
15

16 85. By this time, APCO had already settled with CNLV to receive payment for its own
17 extended overhead costs, and in doing so, waived and released any further claims against CNLV,
18 including Helix's Claim.

19 86. As Helix had previously informed APCO it would, on or about November 13,
20 2013, Helix submitted to APCO another invoice including backup in the amount of \$26,304
21 accounting for the extended overhead costs for September and October ("COR 93").
22

23 87. APCO confirmed to Helix's Kurk Williams that there would be no APCO
24 approval unless and until CNLV approved Helix's request.

25 88. CNLV rejected COR 93.

26 89. By submitting COR 93 to CNLV on November 13, 2013, APCO once again
27 acknowledged that it knew Helix's Conditional Waiver submitted on October 18, 2013 related to
28

1 the Retention Pay App only, and did not waive Helix's Claim for extended overhead.

2 90. If APCO believed the Conditional Waiver released Helix's Claim, APCO would
3 not have continued to submit Helix's Claim to CNLV.

4 91. On January 28, 2014, APCO sent Helix's Victor Fuchs and Bob Johnson an email
5 confirming that he was meeting with CNLV to discuss the remaining change order issues on
6 February 4, 2014. Pelan testified that, CNLV advised APCO that it was rejecting Helix's claim
7 because it had no merit and Helix only had one person on the Project while completing Helix's
8 contract work in 2013. Pelan reported CNLV's position to Helix.³

10 92. The Subcontract incorporated APCO's prime contract with CNLV in Section 1.1,
11 which sets forth CNLV's claims procedure for requests for payment that are escalated to claims.
12 Helix did not request that APCO initiate these proceedings on its behalf regarding the claim for
13 extended overhead.

14 93. On March 31, 2014, CNLV and APCO agreed that there would be no further
15 COR's submitted on the Project.

17 94. On April 16, 2014, Helix's Victor Fuchs threatened to convert the outstanding
18 issues into a claim if Helix's retention was not released per its pay application and release that
19 were submitted on October 18, 2013.

20 95. APCO admitted that on June 10, 2014, it received final retention from CNLV.

21 96. However, because APCO had not paid Helix its Retention or its Claim, Helix sent
22 APCO another demand for payment on September 26, 2014, seeking payment for both its
23 Retention and the Claim.

24 97. CNLV issued the formal notice of completion of the project on July 8, 2014.

27 ³ While the Court finds Pelan's testimony on this issue credible, the testimony of Llamado
28 differs.

1 98. On October 21, 2014, APCO issued check number 1473 in the amount of
2 \$105,679, which represented final payment of Helix's retention, in accordance with the October
3 18, 2013 retention billing and related final release.⁴

4 99. On October 29, 2014, APCO sent Helix an email requesting that it sign a new
5 Conditional Waiver and Release Upon Final Payment which included Helix's Retention only, but
6 did not include any disputed amount for the Claim.
7

8 100. Attached to that email was a copy of the Retention Check APCO informed Helix it
9 could pickup once it received the new executed Conditional Release.

10 101. Upon receiving the new Conditional Waiver and before picking up the Retention
11 Check, Helix notified APCO that it was not going to sign the new Conditional Waiver without
12 reserving a right to its Claim.
13

14 102. APCO invited Helix to revise the new Conditional Waiver as it saw fit, and Helix
15 provided an unsigned copy of it seeking full payment of the Claim and the Retention for a total
16 amount of \$243,830.

17 103. APCO declined to pay the Claim, and after additional discussions between Helix
18 and APCO, it was decided that Helix would exchange for the Retention Check an Unconditional
19 Waiver and Release Upon Final Payment seeking payment of \$105,679 for Retention, and
20 reserving as its Disputed Claim, \$138,151.
21

22 104. As part of the "Disputed Claim" field, Helix referenced additional correspondence
23 which it had incorporated into the Unconditional Waiver and Release.

24 105. Helix included a letter dated October 30, 2014 clarifying that while it was
25 demanding its retention payment, it was also seeking payment for its Claim in the amount of
26

27 ⁴ Because of this lengthy delay in payment, Helix is entitled to interest on the retention amount under NRS
28 338.

1 \$138,151 for which it also provided a final invoice.

2 106. In one such email, Helix writes, "Joe, please accept this email as a 30 day
3 extension of time for the execution of [the] promissory note attached...In good faith we [are]
4 extending this time per your request, so you can come up with an arrangement to repay the
5 outstanding amount that is past due."
6

7 107. APCO never executed the Promissory Note or paid Helix its Claim.

8 108. On October 29, 2014, APCO tendered the check and another signed release for
9 final payment. That release mirrored the one that Helix submitted in October 2013.

10 109. On October 29, 2014, Helix's Victor Fuchs sent an email to Pelan stating: "this is
11 not going to work." Pelan responded that same day stating: "Victor, make changes for me to
12 approve. Thanks."
13

14 110. On October 18, 2013, the Senior Vice President of Helix, Robert D. Johnson,
15 signed a "Conditional Waiver and Release Upon Final Payment".

16 111. Helix received the funds on October 29, 2014.

17 112. On October 30, 2014, the day after negotiating the final payment check, Helix
18 tendered a signed final lien release that purported to reserve Helix's extended overhead invoices
19 in the amount of \$138,151.
20

21 113. Helix has established how certain of its costs increased due to the extended time
22 on the Project given its demobilization and reduction in crew size. Prietzel was the only person
23 on site after May 6, 2013 and he was completing base Subcontract work and change order work
24 that was paid by CNLV.

25 114. After weighing the testimony of the witnesses and a review of the admitted
26 documents, the Court finds, that the delay was not so unreasonable to amount to abandonment
27
28

1 and that therefore the provision limiting damages after a delay does not permit the recovery of
2 extended general conditions.

3 115. Since CNLV determined that the delays through May 13, 2013 were not
4 compensable, the only time period that APCO recovered payment for its delay costs was May 13,
5 2013 through October 13, 2013. During that same compensable time period, Helix's reasonable
6 costs totaled \$43,992.39.⁵ Although Helix was earning revenue and being paid during the time
7 period for the Work and certain approved change orders, APCO by its settlement with CNLV,
8 impaired Helix's ability to pursue the Claim.
9

10 116. Helix has supported its claim for certain additional costs. As Prietzel was paid for
11 his time on site under the approved change orders the claimed expense for acting as a
12 superintendent (supervising only himself) is not appropriate.
13

14 117. After weighing the testimony of the witnesses and a review of the admitted
15 documents, the Court finds, Helix has established that it suffered damages as a result of the delay
16 in project completion in the amount of \$43,992.39.

17 118. If any findings of fact are properly conclusions of law, they shall be treated as if
18 appropriately identified and designated.
19

20 CONCLUSIONS OF LAW

- 21 1. The Subcontract was a valid contract between Helix and APCO.

22
23 ⁵ The Court has utilized the summary used as D5 during the trial with the deletion of the line item
"Superintendent". Those totals for the compensable months with that modification are:

24 May 13	\$8501.05
25 June 13	\$7124.90
26 July 13	\$8270.69
27 August 13	\$6785.04
28 September 13	\$6170.56
October 13	\$7140.15
TOTAL	\$43992.39

1 2. The Court finds that the Conditional Waiver Helix submitted to APCO on or about
2 October 2013 did not constitute a waiver of Helix's Claim.

3 3. APCO's own conduct establishes that it knew Helix was not waiving its Claim as
4 it continued to submit Helix's Claim to CNLV after receiving the Conditional Waiver.

5 4. Helix provided sufficient evidence establishing that it incurred damages as a result
6 of the Project schedule extending nine months past its original completion date.

7 5. APCO had a duty to include Helix's Claim in its own claim to CNLV or otherwise
8 preserve the Claim when it settled, which it failed to do.

9 6. APCO's internal policy and decision to keep Helix's Claim separate from its own
10 claim impaired Helix's ability to pursue the Claim.

11 7. When APCO entered into the settlement agreement with CNLV on October 3,
12 2013 without Helix's knowledge, CNLV took the position that APCO waived and released any
13 and all claims arising from the nine month Project delay, including Helix's Claim.

14 8. In every contract, there is an implied covenant of good faith and fair dealing.

15 9. APCO's impairment of Helix's Claim constitutes a breach of the covenant of good
16 faith and fair dealing implied in the Subcontract.

17 10. APCO breached the covenant of good faith and fair dealing when it, without
18 notifying Helix, settled its claim with CNLV for extended general conditions, impairing Helix
19 from pursuing any pass-through claims to CNLV for its Claim, but continued to submit Helix's
20 Claim to CNLV knowing that CNLV rejected it because it had no contractual privity with Helix,
21 and now APCO had released any and all claims against CNLV.

22 11. Helix is entitled to judgment against APCO under its claim for Breach of Implied
23 Covenant of Good Faith and Fair Dealing and its damages are the damages it has established for
24

1 in the amount of \$43,992.39.⁶

2 12. Because the Project was a public works project, it was governed under NRS
3 Chapter 338.

4 13. Under NRS 338.490, a conditional waiver and release can only release payments
5 for work which is the subject of the payment application to which the wavier and release
6 corresponds.
7

8 14. The Conditional Waiver Helix provided APCO on October 18, 2013, was for
9 retention only and expressly referred to the Retention Pay App (Pay Application No. 161113-022)
10 which sought retention only.

11 15. The Retention Pay App did not include Helix's Claim.

12 16. Therefore, because by statute, the Conditional Waiver can only release work that is
13 the subject of the Retention Pay App, it did not constitute a waiver and release of Helix's Claim.
14

15 17. NRS 338.565 states in relevant part:

16 If a contractor makes payment to a subcontractor or supplier more
17 than 10 days after the occurrence of any of the following acts or
18 omissions: (a) the contractor fails to pay his or her subcontractor or
19 supplier in accordance with the provisions of subsection 1 of NRS
20 338.550...the contractor shall pay to the subcontractor or supplier,
21 in addition to the entire amount of the progress bill or the retainage
22 bill or any portion thereof, interest from the 10th day on the amount
23 delayed, at a rate equal to the lowest daily prime rate...plus 2
24 percent, until payment is made to the subcontractor or supplier.

25 18. NRS 338.550(1) required APCO to pay Helix its retention within 10 days of
26 receiving its retention payment from CNLV.

27 ⁶ The Court has not awarded separate damages for the breach of contract claim as those would be duplicative
28 of this award.

1 19. APCO admits it received its retention payment from CNLV on June 10, 2014, yet
2 it did not pay Helix its retention until October 30, 2014, more than four months later and in
3 violation of NRS 338.550(1).

4 20. APCO was required to pay Helix its retention amount of \$105,677.01, in addition
5 to interest at the rate of prime plus 2 percent from June 10, 2014 through October 30, 2014.
6
7 APCO failed to do so.

8 21. After providing APCO with the Conditional Waiver, Helix incurred additional
9 damages that could not be waived by way of the Conditional Waiver (i.e. the interest on its
10 wrongfully withheld retention).

11 22. On June 10, 2014, APCO received final retention from CNLV.

12 23. APCO failed to pay Helix its retention in the amount of \$105,679 until October 29,
13 2014.
14

15 24. Pursuant to NRS 338.550(1), APCO was required to pay Helix its retention no
16 later than June 21, 2014.

17 25. As a result of APCO's failure, and pursuant to NRS 338.565(1), APCO is required
18 to pay Helix interest on \$105,677.01 from June 22, 2014 through October 28, 2014, at a rate of
19 5.25% for a total of \$1,960.85.

20 26. Even if the pay-if-paid clause was enforceable, APCO cannot rely upon it to shield
21 itself from liability to Helix when its decision to submit Helix's Claim separately from its claim
22 led to CNLV rejecting Helix's Claim, and APCO's settlement with CNLV forever barred APCO
23 from receiving payment from CNLV for Helix's Claim.
24

25 27. To the extent the delays were caused by CNLV, APCO is still liable to Helix since
26 it impaired those claims in contradiction to NRS 624.628(3)(c) by entering into a settlement
27 agreement with CNLV on October 2, 2013.
28

1 28. Because this Court has found APCO breached the Subcontract and breached the
2 covenant of good faith and fair dealing, Helix is entitled to judgment against Safeco and the
3 Payment Bond as well.

4 29. NRS 339.025(1)(b) provides the following:
5

6 1. Before any contract,..., exceeding \$100,000 for any project
7 for the new construction, repair or reconstruction of any public
8 building or other public work or public improvement of any
9 contracting body is awarded to any contractor, the contractor shall
furnish to the contracting body the following bonds which become
binding upon the award of the contract to the contractor;

10 a.

11 b. A payment bond in an amount to be fixed by the
12 contracting body, but not less than 50 percent of the contract
13 amount, conditioned upon the faithful performance of the
14 contract in accordance with the plans, specifications and
15 conditions of the contract. The bond must be solely for the
protection of claimants supplying labor or materials to the
contractor to whom the contract was awarded, or to any of his
or her subcontractors, in the prosecution of the work provided
for in such contract.

16 30. NRS 339.035(1) provides:

17 ...any claimant who has performed labor or furnished material in
18 the prosecution of the work provided for in any contract for which
19 a payment bond has been given pursuant to the provisions of
20 subsection 1 of NRS 339.025, and who has not been paid in full
21 before the expiration of 90 days after the date on which the
22 claimant performed the last of such labor or furnished the last of
23 such materials for which the claimant claims payment, may bring
an action on such payment bond in his or her own name to recover
any amount due the claimant for such labor or material, and may
prosecute such action to final judgment and have execution on the
judgment.

24 31. SAFECO issued a Labor and Material Payment Bond, Bond No. 024043470,
25 wherein APCO is the principal and SAFECO is the surety.

26 32. Helix provided Work to the Project and remains unpaid for the same.

27 33. Therefore, Helix is a claimant against the Bond and may execute a judgment
28

1 against the same.

2 34. Section 20.5 of the Subcontract provides that “ [i]n the event either party employs
3 an attorney to institute a lawsuit or to demand arbitration for any cause arising out of the
4 Subcontract Work or the Subcontract, or any of the Contract Documents, the prevailing party
5 shall be entitled to all costs, attorney’s fees and any other reasonable expenses incurred therein.”
6

7 35. This provision was not modified by the Helix Addendum.

8 36. The Court finds that Helix is the prevailing party and is entitled to an award of its
9 attorneys’ fees and costs.

10 37. If any conclusions of law are properly findings of fact, they shall be treated as if
11 appropriately identified and designated.

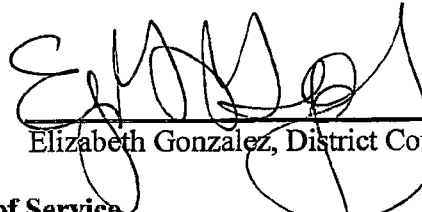
12 Based upon the foregoing Findings of Fact and Conclusions of Law **IT IS HEREBY**
13 **ORDERED, ADJUDGED AND DECREED** as follows:
14

- 15 1. **IT IS HEREBY ORDERED** that, as to Plaintiff’s Claim for Breach of Contract
16 against APCO, this Court finds in favor of Plaintiff but as the Claim was impaired
17 awards damages under the Breach of the Implied Covenant of Good Faith and
18 Fair Dealing, rather than awarding duplicative damages;
- 19 2. **IT IS FURTHER ORDERED** that, as to Plaintiff’s Claim for Breach of the
20 Implied Covenant of Good Faith and Fair Dealing against APCO, this Court finds
21 in favor of Plaintiff and awards damages in the amount of \$43,992.39 together
22 with interest as provided by law and taxable costs of suit;
- 23 3. **IT IS FURTHER ORDERED** that, as to Plaintiff’s Claim for violations of NRS
24 338 against APCO, this Court finds in favor of Plaintiff in the amount of
25 \$1,960.85;⁷
26
27

28 ⁷ These damages are in addition to those awarded under the claim of Breach of the Implied Covenant of Good


- 1 4. **IT IS FURTHER ORDERED** that, given the Court's findings against APCO,
2 the Court finds in favor of Plaintiff and against Safeco and the Bond;
3 5. **IT IS FURTHER ORDERED** that this Court will address any issues of
4 attorneys' fees through motions that may be filed with the Court.
5 6. Any claim not otherwise disposed of by this decision is dismissed.
6

7 DATED this 8th day of July, 2019.
8

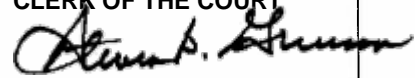
9 
10 Elizabeth Gonzalez, District Court Judge
11

12 **Certificate of Service**

13 I hereby certify that on the date filed, a copy of the foregoing Scheduling Order and
14 Order Setting Civil Jury Trial, Pre-Trial and Calendar Call was electronically served, pursuant to
15 N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing
16 Program.
17

18 
19 Dan Kutinac
20
21
22
23
24
25
26
27
28

Faith and Fair Dealing.



1 ASTA

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2 Brandi M. Planet, Esq. (Bar No. 11710)

Christopher H. Byrd, Esq. (Bar No. 1633)

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7 Attorneys for APCO Construction, Inc.

and Safeco Insurance Company of America

8
9 **DISTRICT COURT**

10 **CLARK COUNTY, NEVADA**

11 HELIX ELECTRIC OF NEVADA, LLC, a Case No.: A-16-730091-C

Nevada limited liability company,

Dept. No.: XI

12 Plaintiff,

13 v.

CASE APPEAL STATEMENT

14 APCO CONSTRUCTION, a Nevada
15 corporation; SAFECO INSURANCE
16 COMPANY OF AMERICA; DOES I through X;
17 and BOE BONDING COMPANIES, I through
X.

18 Defendants.

19 1. Appellants are: APCO Construction, Inc. and Safeco Insurance Company of
20 America.; Respondent is: Helix Electric of Nevada, LLC.

21 2. This is an appeal from Final Judgment, written notice of entry of which was given
22 November 6, 2019; the Findings of Fact and Conclusions of Law incorporated by reference in the
23 Final Judgment, written notice of entry of which was given on July 10, 2019, and related orders.

24 3. The name and address of counsel for the Appellants is as follows:

25 John Randall Jefferies, Esq.

Brandi M. Planet, Esq.

26 Christopher H. Byrd, Esq.

FENNEMORE CRAIG, P.C.

27 300 S. Fourth Street, Suite 1400

Las Vegas, NV 89101

28 Telephone: (702) 692-8000; Facsimile: (702) 692-8099

1 E-mail: rjefferies@fclaw.com
2 bplanet@fclaw.com
3 cbyrd@fclaw.com

Attorneys for APCO Construction, Inc. and Safeco Insurance Company of America

- 4 4. The name and address of Respondent's trial counsel is as follows:

5 Cary B. Domina, Esq.
6 Ronald J. Cox, Esq.
7 Jeremy Holmes, Esq.
8 Peel Brimley LLP
9 3333 E. Serene Avenue Suite 200
10 Henderson, NV 89074
11 Telephone: (702) 990-7272; Facsimile: (702) 990-7273
12 E-mail: cdomina@peelbrimley.com
13 rcox@peelbrimley.com
14 jholmes@peelbrimley.com
15 *Attorneys for Helix Electric of Nevada, LLC*

- 16 5. Appellants were not granted leave to proceed in forma pauperis.

- 17 6. Proceedings in the District Court commenced on January 12, 2016.

18 7. The original action brought by Respondent was for breach of contract, breach of the
19 implied covenant of good faith and fair dealing, unjust enrichment or in the alternative quantum
20 meruit, violation of NRS 338.550 and claim against payment bond. This is an appeal from the
21 Final Judgment written notice of entry of which was given November 6, 2019; the Findings of
22 Fact and Conclusions of Law incorporated by reference therein, written notice of which was given
23 on July 10, 2019; and all orders prior to the entry of the Final Judgment, including but not limited
24 to the following: (A) Denial of Appellants' Omnibus Motion in Limine 1-2; (B) Denial of
25 Appellants' Motion in Limine No. 3 to Preclude the Introduction of Evidence Related to Helix's
26 Extended General Conditions and Motion in Limine No. 4 to Preclude Any Evidence of Helix's
27 Accounting Data or Job Cost Reports; (C) Denial of Appellants' Motion to Exclude the Testimony
28 of Kurt Williams; (D) Denial of Appellants' Motion for Clarification and or Amendment of
Findings of fact and Conclusions of Law; and (E) Grant of Respondent's Motion for Attorneys'
Fees, Costs and Interest.

On July 20, 2018, Appellants filed their Omnibus Motion in Limine 1-2. The District Court held a hearing on the Omnibus Motion in Limine 1-2 on November 28, 2018. The ruling on this motion was deferred until the time of trial. On December 23, 2018, Appellants filed their

1 combined Motion in Limine No. 3 to Preclude the Introduction of Evidence Related to Helix's
2 Extended General Conditions and Motion in Limine No. 4 to Preclude Any Evidence of Helix's
3 Accounting Data or Job Cost Reports. The District Court held a hearing on Motions in Limine 3
4 and 4 on May 13, 2019 and denied the motions. On May 22, 2019, Appellants filed their Motion
5 to Exclude the Testimony of Kurt Williams. The District Court held a hearing on the Motion to
6 Exclude the Testimony of Kurt Williams on June 3, 2019 and denied the motion.

7 On July 15, 2019, Appellants filed their Motion for Clarification. The District Court held a
8 hearing on the Motion for Clarification on August 19, 2019 and denied the motion. Respondent
9 filed its Motion for Attorneys' Fees, Costs and Interest on July 31, 2019. The District Court held a
10 hearing on the Motion For Attorneys' Fees, Costs and Interest on September 30, 2019. By Final
11 Judgment, the District Court awarded Respondent 1) \$43,992.39 in damages for the breach of
12 contract and breach of the implied covenant of good faith and fair dealing claims; 2) \$1,960.85 for
13 violations of NRS 338; 3) \$149,336.06 in attorneys fees; 4) \$8,949.40 in costs; and 5) \$14,927.58
14 in interest.

15 8. There has been no appeal or writ proceeding in the Supreme Court related to the
16 above-captioned matter.

17 9. This appeal does not involve child custody or visitation.

18 10. This appeal involves issues with the possibility of settlement.

19 Dated this 6th day of December, 2019

20 **FENNEMORE CRAIG, P.C.**

21 /s/ John Randall Jefferies

22 John Randall Jefferies, Esq. (Bar No. 3512)

23 Brandi M. Planet, Esq. (Bar No. 11710)

24 Christopher H. Byrd, Esq. (Bar No. 1633)

25 *Attorneys for APCO Construction, Inc.*

26 *and Safeco Insurance Company of America*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of Fennemore Craig, P.C., and further certify that
3 the **CASE APPEAL STATEMENT** was served by electronic filing via Odyssey File & Serve e-
4 filing system and serving all parties with an email address on record, pursuant to the Administrative
5 Order 14-2 and Rule 9 N.E.F.C. as follows:

6 **Other Service Contacts:**

7 Amanda Armstrong aarmstrongatpeelbrimley.com

8 Cary B. Domina cdominaatpeelbrimley.com

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20 Kassi Rife KRifeatfclaw.com

21 Dated this 6th day of December, 2019.

22 /s/ Trista Day

23 An Employee of Fennemore Craig, P.C.

CASE SUMMARY**CASE NO. A-16-730091-B**

Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

§
§
§
§
§
§

Location: **Department 11**
 Judicial Officer: **Gonzalez, Elizabeth**
 Filed on: **01/12/2016**
 Case Number History: **A-16-730091-C**
 Cross-Reference Case Number: **A730091**

CASE INFORMATION**Statistical Closures**

07/09/2019 Judgment Reached (bench trial)

Case Type: **Other Business Court Matters**

Case Status: **07/09/2019 Closed**

DATE**CASE ASSIGNMENT****Current Case Assignment**

Case Number A-16-730091-B
 Court Department 11
 Date Assigned 01/28/2019
 Judicial Officer Gonzalez, Elizabeth

PARTY INFORMATION**Plaintiff****Helix Electric of Nevada LLC***Lead Attorneys*

Domina, Cary
Retained
 702-990-7272(W)

Defendant**APCO Construction**

Jefferies, John R.
Retained
 702-408-3400(W)

Safeco Insurance Company of America

Jefferies, John R.
Retained
 702-408-3400(W)

DATE**EVENTS & ORDERS OF THE COURT****INDEX****EVENTS**

01/12/2016



Complaint

Filed By: Plaintiff Helix Electric of Nevada LLC
Complaint

01/19/2016



Summons

Filed by: Plaintiff Helix Electric of Nevada LLC
Summons

01/20/2016



Summons

Filed by: Plaintiff Helix Electric of Nevada LLC
Summons

03/16/2016



Stipulation and Order

Filed by: Defendant APCO Construction
Stipulation and Order to Stay Case Pending Arbitration

03/17/2016



Notice of Entry of Stipulation and Order

CASE SUMMARY

CASE NO. A-16-730091-B

	<p>Filed By: Plaintiff Helix Electric of Nevada LLC <i>Notice of Entry of Stipulation and Order</i></p>
03/03/2017	<p> Motion Filed By: Plaintiff Helix Electric of Nevada LLC <i>Helix Electric of Nevada, LLC's Motion to Lift Stay</i></p>
03/28/2017	<p> Notice of Entry of Stipulation and Order Filed By: Plaintiff Helix Electric of Nevada LLC <i>Notice of Entry of Stipulation and Order</i></p>
03/28/2017	<p> Stipulation and Order Filed by: Defendant APCO Construction <i>Stipulation and Order to Lift Stay</i></p>
04/11/2017	<p> Answer to Complaint Filed by: Defendant APCO Construction <i>Apco Constructions' Answer to Plaintiff's Complaint</i></p>
04/11/2017	<p> Initial Appearance Fee Disclosure Filed By: Defendant APCO Construction <i>Defendants' Initial Appearance Fee Disclosure</i></p>
04/11/2017	<p> Motion to Dismiss Filed By: Defendant APCO Construction <i>Safeco's Motion to Dismiss Plaintiff's Claims Against Bond and Countermotion for Fees and Costs of Motion</i></p>
04/11/2017	<p> Initial Appearance Fee Disclosure Filed By: Defendant Safeco Insurance Company of America <i>Defendants' Initial Appearance Fee Disclosure</i></p>
04/28/2017	<p> Opposition to Motion to Dismiss Filed By: Plaintiff Helix Electric of Nevada LLC <i>Helix Electric of Nevada, LLC's Opposition to Safeco Insurance Company of America's (i) Motion to Dismiss; and (ii) Countermotion for Fees and Costs</i></p>
05/10/2017	<p> Reply to Motion Filed By: Defendant Safeco Insurance Company of America <i>Defendants' Reply in Support of Motion to Dismiss Plaintiff's Claims Against Bond and Countermotion for Fees and Costs of Motion</i></p>
05/23/2017	<p> Motion for Partial Summary Judgment Filed By: Defendant APCO Construction; Defendant Safeco Insurance Company of America <i>Defendants' Motion for Partial Summary Judgment</i></p>
05/23/2017	<p> Initial Appearance Fee Disclosure Filed By: Defendant APCO Construction; Defendant Safeco Insurance Company of America <i>Initial Appearance Fee Disclosure</i></p>
06/09/2017	<p> Opposition to Motion For Summary Judgment Filed By: Plaintiff Helix Electric of Nevada LLC <i>Helix Electric of Nevada, LLC's Opposiiton to APCO Construction's Motion for Partial</i></p>

CASE SUMMARY

CASE NO. A-16-730091-B

Summary Judgment

06/12/2017	 Commissioners Decision on Request for Exemption - Granted <i>Commissioner's Decision on Request for Exemption - Granted</i>
06/19/2017	 Arbitration File <i>Arbitration File</i>
06/21/2017	 Reply in Support Filed By: Defendant APCO Construction; Defendant Safeco Insurance Company of America <i>Defendants' Reply in Support of Motion for Partial Summary Judgment</i>
07/06/2017	 Stipulation and Order Filed by: Plaintiff Helix Electric of Nevada LLC <i>Stipulation and Order to Continue Hearing</i>
07/11/2017	 Notice of Entry of Stipulation and Order Filed By: Plaintiff Helix Electric of Nevada LLC <i>Notice of Entry of Stipulatio and Order</i>
07/14/2017	 Notice of Entry of Stipulation and Order Filed By: Plaintiff Helix Electric of Nevada LLC <i>Notice of Entry of Stipulation and Order</i>
09/07/2017	 Order Denying Motion Filed By: Plaintiff Helix Electric of Nevada LLC <i>Order Denying Motion for Partial Summary Judgment</i>
09/07/2017	 Order Denying Motion Filed By: Plaintiff Helix Electric of Nevada LLC <i>Order Denying Motion to Dismiss and Motion for Fees and Costs</i>
09/07/2017	 Notice of Entry of Order Filed By: Plaintiff Helix Electric of Nevada LLC <i>Notice of Entry of Order</i>
09/07/2017	 Notice of Entry of Order Filed By: Plaintiff Helix Electric of Nevada LLC <i>Notice of Entry of Order</i>
10/26/2017	 Joint Case Conference Report Filed By: Plaintiff Helix Electric of Nevada LLC <i>Joint Case Conference Report</i>
01/03/2018	 Scheduling Order <i>Scheduling Order</i>
01/24/2018	 Order Setting Civil Non-Jury Trial <i>Order Setting Civil Non-Jury Trial and Calendar Call</i>
07/09/2018	 Notice of Appearance <i>Notice of Appearance and Request for Special Notice</i>

CASE SUMMARY

CASE NO. A-16-730091-B

07/20/2018	 Motion in Limine Filed By: Defendant APCO Construction <i>Apco Construction, Inc. and Safeco Insurance Company of America's Omnibus Motion in Limine 1-2</i>
08/03/2018	 Amended Order Setting Civil Non-Jury Trial <i>Amended Order Setting Civil Non-Jury Trial</i>
08/20/2018	 Stipulation and Order Filed by: Defendant APCO Construction <i>Stipulation and Order to Move Trial Date Only</i>
08/21/2018	 Notice of Entry of Stipulation and Order <i>Notice of Entry of Stipulation and Order to Move Trial Date Only</i>
11/20/2018	 Opposition to Motion in Limine Filed By: Plaintiff Helix Electric of Nevada LLC <i>Helix Electric of Nevada, LLC's Opposition to APCO Construction's Omnibus Motion in Limine 1-2</i>
11/21/2018	 Reply in Support <i>Apco Construction, Inc. and Safeco Insurance Company of America's Reply in Support of its Omnibus Motion in Limine 1-2</i>
11/27/2018	 Motion to Continue Trial Filed By: Defendant APCO Construction; Defendant Safeco Insurance Company of America <i>Apco Construction, Inc. and Safeco Insurance Company of America's Motion to Continue Trial (Second Request)</i>
11/29/2018	 Declaration Filed By: Plaintiff Helix Electric of Nevada LLC <i>Declaration of Victor Fuchs in Support of Helix Electric of Nevada, LLC's Opposition to APCO Construction's Omnibus Motion in Limine 1-2</i>
12/14/2018	 Opposition to Motion Filed By: Plaintiff Helix Electric of Nevada LLC <i>Helix Electric of Nevada, LLC's Opposition to APCO Construction and Safeco Insurance Company of America's Motion to Continue Trial</i>
12/23/2018	 Motion in Limine Filed By: Defendant APCO Construction; Defendant Safeco Insurance Company of America <i>Apco Construction, Inc. And Safeco Insurance Company Of America's Motion In Limine No. 3 To Preclude The Introduction Of Evidence Realated To Helix's Extened General Conditions And Motion In Limine No. 4 To Preclude Any Evidence Of Helix's Accounting Data Or Job Cost Reports</i>
01/02/2019	 Reply in Support Filed By: Defendant APCO Construction <i>Apco Construction, Inc.'s Reply in Support of its Motion to Continue Trial</i>
01/05/2019	 Notice of Change of Hearing <i>Notice of Change of Hearing</i>

CASE SUMMARY

CASE NO. A-16-730091-B

01/07/2019	Case Reassigned to Department 18 <i>Judicial Reassignment - From Judge Villani to Judge Holthus</i>
01/08/2019	 Peremptory Challenge Filed by: Plaintiff Helix Electric of Nevada LLC <i>Peremptory Challenge</i>
01/10/2019	 Notice of Department Reassignment <i>Notice of Department Reassignment</i>
01/25/2019	 Notice of Appearance Party: Defendant APCO Construction <i>Notice of Appearance</i>
01/25/2019	 Request to Transfer to Business Court Filed by: Plaintiff Helix Electric of Nevada LLC <i>Request to Transfer to Business Court</i>
01/28/2019	 Notice of Department Reassignment <i>Notice of Department Reassignment</i>
01/29/2019	 Business Court Order <i>Business Court Order</i>
01/30/2019	 Substitution of Attorney <i>Substitution of Counsel</i>
01/30/2019	 Consent <i>Consent to Substitution of Counsel</i>
03/04/2019	 Notice of Withdrawal of Attorney Filed by: Defendant APCO Construction; Defendant Safeco Insurance Company of America <i>Notice of Withdrawal of Co-Counsel of Record</i>
03/07/2019	 Business Court Order <i>Business Court Scheduling Order and Order Setting Civil Bench Trial and Calendar Call</i>
03/19/2019	 Order
03/25/2019	 Stipulation and Order Filed by: Plaintiff Helix Electric of Nevada LLC <i>Stipulation and Order to Extend Opposition and Reply Deadlines and Schedule Hearing</i>
03/25/2019	 Notice of Entry of Stipulation and Order Filed By: Plaintiff Helix Electric of Nevada LLC <i>Notice of Entry of Stipulation and Order</i>
03/29/2019	 Opposition to Motion in Limine Filed By: Plaintiff Helix Electric of Nevada LLC <i>Helix Electric of Nevada, LLC's Opposition to APCO Construction's and Safeco Insurance Company of America's Motion in Limine No. 3 to Preclude the Introduction of Evidence Related to Helix's Extended General Conditions and Motion in Limine No. 4 to Preclude any Evidence of Helix's Accounting Date or Job Cost Reports</i>

CASE SUMMARY

CASE NO. A-16-730091-B

03/29/2019



Appendix

Filed By: Plaintiff Helix Electric of Nevada LLC
Appendix to Helix Electric of Nevada, LLC's Opposition to APCO Construction's and Safeco Insurance Company of America's Motion in Limine No. 3 to Preclude the Introduction of Evidence Related to Helix's Extended General Conditions and Motion in Limine No. 4 to Preclude any Evidence of Helix's Accounting Date or Job Cost Reports

04/08/2019



Reply in Support

Filed By: Defendant APCO Construction
APCO Construction, Inc. and Safeco Insurance Company of America's Reply in Support of: Motion in Limine No. 3 to Preclude the Introduction of Evidence Related to Helix's Extended General Conditions and Motion in Limine No. 4

05/16/2019



Answer

Safeco Insurance Company of American's Answer to Plaintiff's Complaint

05/22/2019



Motion to Exclude

Filed By: Defendant APCO Construction; Defendant Safeco Insurance Company of America
APCO Construction, Inc. and Safeco Insurance Company of America's Motion to Exclude the Testimony of Kurt Williams on Order Shortening Time

05/24/2019



Joint Pre-Trial Memorandum

Joint Pre-Trial Memorandum

05/29/2019



Deposition

Filed By: Plaintiff Helix Electric of Nevada LLC
Plaintiff's Designation of Deposition Testimony

05/30/2019



Deposition

Filed By: Plaintiff Helix Electric of Nevada LLC
Plaintiff's Supplemental Designation of Deposition Testimony

05/30/2019



Affidavit of Service

Filed By: Plaintiff Helix Electric of Nevada LLC
Affidavit/Declaration of Service - Joemel Llamado

05/30/2019



Deposition

Filed By: Defendant APCO Construction; Defendant Safeco Insurance Company of America
Defendants' Designation of Deposition Testimony

05/31/2019



Opposition to Motion

Filed By: Plaintiff Helix Electric of Nevada LLC
Helix Electric of Nevada, LLC's Opposition to APCO Construction's and Safeco Insurance Company of America's Motion to Exclude the Testimony of Kurt Williams

05/31/2019



Pre-trial Memorandum

Filed by: Defendant APCO Construction
APCO Construction, Inc. and Safeco Insurance Company of America's Pre-Trial Bench Memorandum

05/31/2019



Trial Memorandum

Filed by: Defendant APCO Construction

CASE SUMMARY

CASE NO. A-16-730091-B

APCO Construction, Inc.'s Trial Memorandum Pursuant to EDCR 7.27 re: Potential Evidentiary Issues

05/31/2019	 Finding of Fact and Conclusions of Law Filed By: Defendant APCO Construction <i>APCO Consturction, Inc.'s and Safeco Insurance Company of America's Proposed Findings of Fact and Conclusions of Law</i>
06/05/2019	 Receipt <i>Receipt of Trial Exhibits</i>
06/05/2019	 Receipt <i>Receipt of Deposition Transcripts</i>
06/05/2019	 Receipt <i>Receipt of Deposition Transcripts</i>
07/08/2019	 Findings of Fact, Conclusions of Law and Judgment <i>Findings of Fact and Conclusions of Law</i>
07/09/2019	 Order to Statistically Close Case <i>Civil Order to Statistically Close Case</i>
07/10/2019	 Notice of Entry of Order Filed By: Plaintiff Helix Electric of Nevada LLC <i>Notice of Entry of Findings of Facts and Conclusions of Law and Order</i>
07/12/2019	 Memorandum of Costs and Disbursements Filed By: Plaintiff Helix Electric of Nevada LLC <i>Helix Electric of Nevada, LLC's Memorandum of Costs and Disbursements</i>
07/15/2019	 Motion for Clarification Filed By: Defendant APCO Construction <i>APCO Construction, Inc.'s and Safeco Insurance Company of America's Motion for Clarification and/or Amendment to Findings of Fact and Conclusions of Law</i>
07/15/2019	 Clerk's Notice of Hearing <i>Notice of Hearing</i>
07/24/2019	 Transcript of Proceedings <i>Transcript of Proceedings: Bench Trial - Day 1</i>
07/24/2019	 Transcript of Proceedings <i>Transcript of Proceedings: Bench Trial - Day 2</i>
07/24/2019	 Transcript of Proceedings <i>Transcript of Proceedings: Bench Trial - Day 3</i>
07/29/2019	 Opposition and Countermotion Filed By: Plaintiff Helix Electric of Nevada LLC <i>Helix Electric of Nevada, LLC's (I) Opposition to APCO Construction, Inc.'s and Safe Insurance Company of America's Motion for Clarification and/or Amendment to Findings of Fact and Conclusions of Law; and (II) Countermotion for Amendment to Findings of Fact and Conclusions of Law</i>

CASE SUMMARY

CASE NO. A-16-730091-B

07/31/2019	 Motion for Attorney Fees and Costs Filed By: Plaintiff Helix Electric of Nevada LLC <i>Helix Electric of Nevada, LLC's Motion for Attorney's Fees, Costs and Interest</i>
08/01/2019	 Clerk's Notice of Hearing <i>Notice of Hearing</i>
08/12/2019	 Opposition Filed By: Defendant APCO Construction; Defendant Safeco Insurance Company of America <i>APCO Construction, Inc.'s and Safeco Insurance Company of America's Opposition to Helix's Countermotion for Amendment to Findings of Fact and Conclusions of Law; and Reply in Support of Motion for Clarification and/or Amendment to Findings of Fact and Conclusions of Law</i>
08/15/2019	 Stipulation and Order <i>Stipulation and Order to Extend Time to File Opposition to Motion for Attorneys' Fees, Costs and Interest</i>
08/15/2019	 Notice of Entry of Stipulation and Order Filed By: Defendant APCO Construction; Defendant Safeco Insurance Company of America <i>Notice of Entry of Stipulation and Order</i>
08/15/2019	 Reply in Support Filed By: Plaintiff Helix Electric of Nevada LLC <i>Helix Electric of Nevada, LLC's Reply in Support of Helix's Countermotion for Amendment to Findings of Facts and Conclusions of Law</i>
08/26/2019	 Stipulation and Order Filed by: Defendant APCO Construction <i>Stipulation and Order to Extend Time to File Opposition to Motion for Attorneys' Fees, Costs and Interest and Reschedule Hearing</i>
08/26/2019	 Notice of Entry of Stipulation and Order Filed By: Defendant APCO Construction <i>Notice of Entry of Stipulation and Order</i>
09/12/2019	 Opposition Filed By: Defendant APCO Construction <i>Defendants' Opposition to Motion for Attorneys' Fees, Costs and Interest</i>
09/23/2019	 Reply in Support Filed By: Plaintiff Helix Electric of Nevada LLC <i>Helix Electric of Nevada, LLC's Reply in Support of its Motion for Attorneys' Fees, Costs and Interest</i>
10/01/2019	 Supplement Filed by: Plaintiff Helix Electric of Nevada LLC <i>Helix Electric of Nevada, LLC's Supplement to its Motion for Attorneys' Fees, Costs and Interest</i>
11/06/2019	 Judgment Filed By: Plaintiff Helix Electric of Nevada LLC

CASE SUMMARY

CASE NO. A-16-730091-B

Final Judgment

11/06/2019



Notice of Entry of Order

Filed By: Plaintiff Helix Electric of Nevada LLC

Notice of Entry of Final Judgment

12/06/2019



Case Appeal Statement

Filed By: Defendant APCO Construction; Defendant Safeco Insurance Company of America

Case Appeal Statement

12/06/2019



Notice of Appeal

Filed By: Defendant APCO Construction; Defendant Safeco Insurance Company of America

Notice of Appeal

DISPOSITIONS

07/08/2019

Judgment (Judicial Officer: Gonzalez, Elizabeth)

Debtors: APCO Construction (Defendant)

Creditors: Helix Electric of Nevada LLC (Plaintiff)

Judgment: 07/08/2019, Docketed: 07/09/2019

Total Judgment: 43,992.39

Debtors: APCO Construction (Defendant)

Creditors: Helix Electric of Nevada LLC (Plaintiff)

Judgment: 07/08/2019, Docketed: 07/09/2019

Total Judgment: 1,960.85

Debtors: Safeco Insurance Company of America (Defendant)

Creditors: Helix Electric of Nevada LLC (Plaintiff)

Judgment: 07/08/2019, Docketed: 07/09/2019

07/08/2019

Order of Dismissal (Judicial Officer: Gonzalez, Elizabeth)

Debtors: APCO Construction (Defendant), Safeco Insurance Company of America (Defendant)

Creditors: Helix Electric of Nevada LLC (Plaintiff)

Judgment: 07/08/2019, Docketed: 07/09/2019

Comment: Certain Claims

11/06/2019

Judgment (Judicial Officer: Gonzalez, Elizabeth)

Debtors: APCO Construction (Defendant), Safeco Insurance Company of America (Defendant)

Creditors: Helix Electric of Nevada LLC (Plaintiff)

Judgment: 11/06/2019, Docketed: 11/06/2019

Total Judgment: 219,116.28

11/06/2019

Order of Dismissal (Judicial Officer: Gonzalez, Elizabeth)

Debtors: APCO Construction (Defendant), Safeco Insurance Company of America (Defendant)

Creditors: Helix Electric of Nevada LLC (Plaintiff)

Judgment: 11/06/2019, Docketed: 11/06/2019

Comment: Certain Claim

HEARINGS

04/05/2017

CANCELED Motion to Stay (3:00 AM) (Judicial Officer: Villani, Michael)

Vacated - per Law Clerk

Helix Electric of Nevada, LLC's Motion to Lift Stay

05/17/2017

Motion to Dismiss (8:30 AM) (Judicial Officer: Villani, Michael)






Safeco's Motion to Dismiss Plaintiff's Claims Against Bond and Countermotion for Fees and Costs of Motion

MINUTES

Under Advisement;






CASE SUMMARY

CASE NO. A-16-730091-B

05/17/2017	<p>Opposition and Countermotion (8:30 AM) (Judicial Officer: Villani, Michael) <i>Helix Electric of Nevada, LLC's Opposition to Safeco Insurance Company of America's (i) Motion to Dismiss; and (ii) Countermotion for Fees and Costs</i></p> <p>MINUTES Under Advisement;</p>
05/17/2017	<p> All Pending Motions (8:30 AM) (Judicial Officer: Villani, Michael) Matter Heard; Journal Entry Details: <i>Arguements by counsel regarding the merits of the motion. COURT ORDERED, Decision DEFERRED. The Court will prepare a written decision.;</i></p>
06/09/2017	<p> Minute Order (4:00 PM) (Judicial Officer: Villani, Michael) Decision Made; Journal Entry Details: <i>CLERK'S NOTE: A copy of this minute order was placed in the attorney folder(s) of Cary Domina, Esq. and Cody Mounteer, Esq.//ob/06/09/17.;</i></p>
07/26/2017	<p> Motion for Partial Summary Judgment (8:30 AM) (Judicial Officer: Villani, Michael) <i>Defendants' Motion for Partial Summary Judgment</i> Motion Denied; Journal Entry Details: <i>Arguments by counsel regarding the merits of the motion. Court stated there was a question of fact as far as the timeliness notice of extent of the submittals, the timing of the submittals, whether or not the submittals could have been supplemented in the settlement negotiation and the settlement package with the city. COURT ORDERED, Motion DENIED. Mr. Domina to prepare the Order and submit to opposing counsel as to form and content. Upon Court s inquiry, Mr. Domina advised this was a bench trial.;</i></p>
08/29/2018	<p>CANCELED Calendar Call (9:00 AM) (Judicial Officer: Villani, Michael) <i>Vacated</i></p>
09/04/2018	<p>CANCELED Bench Trial (10:00 AM) (Judicial Officer: Villani, Michael) <i>Vacated</i></p>
11/28/2018	<p> Omnibus Motion in Limine (8:30 AM) (Judicial Officer: Villani, Michael) <i>APCO Construction Inc and Safeco Insurance Company of America's Omnibus Motion in Limine 1-2</i> Per email from Law Clerk Per 10/23/18 email from law clerk Deferred Ruling; Journal Entry Details: <i>Arguments by counsel. Court does not find that there is a contract and stated there are still remaining questions; therefore, ORDERED, ruling DEFERRED as to Motions in Limine 1-2 to the time of trial. Upon Court's inquiry, Mr. Jefferies advised he has another trial going forward and has filed a Motion to Continue Trial. COURT SO NOTED. COURT FINDS this matter raises issue of fact that is better to be referred to the time of trial and ORDERED Mr. Domina to prepare the Order.;</i></p>
12/04/2018	<p> Minute Order (3:00 PM) (Judicial Officer: Villani, Michael) Minute Order - No Hearing Held; Journal Entry Details: <i>Due to the Court's schedule, COURT ORDERED, matter currently set for 01/02/19 is hereby RESCHEDULED to 01/09/19. CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Haly Pannullo, to all registered parties for Odyssey File & Serve hyp/12/04/18;</i></p>
01/09/2019	<p>CANCELED Motion to Continue Trial (9:00 AM) (Judicial Officer: Villani, Michael)</p>

CASE SUMMARY

CASE NO. A-16-730091-B

	<p><i>Vacated</i> <i>Apco Construction, Inc. and Safeco Insurance Company of America's Motion to Continue Trial (Second Request)</i></p>
01/30/2019	<p>CANCELED Calendar Call (10:00 AM) (Judicial Officer: Villani, Michael) <i>Vacated</i></p>
02/11/2019	<p>CANCELED Bench Trial (9:00 AM) (Judicial Officer: Villani, Michael) <i>Vacated</i></p>
03/04/2019	<p> Mandatory Rule 16 Conference (9:00 AM) (Judicial Officer: Gonzalez, Elizabeth) Trial Date Set; Journal Entry Details: <i>Court inquired as to how long parties will need for discovery. Mr. Domina advised this is a very unique situation as they are done with discovery; the case started two years ago and they got all the way through arbitration; there was another attorney prior to Mr. Jefferies and that attorney decided to disqualify the arbitrator; they could not select a new one, so they decided to lift the stay and bring the case back to District Court; they are done with discovery and are ready for trial. Parties declined the offer of a settlement conference. COURT ORDERED, given the representations of counsel that discovery and designations occurred during the arbitration process, matter SET for Bench Trial on the stack beginning May 28, 2019. Trial Setting Order will ISSUE. The last day to file motions in limine and dispositive motions is April 5, 2019. Counsel advised there was one pending motion in limine which has not yet been fully briefed. COURT DIRECTED counsel to renote that motion.;</i></p>
05/13/2019	<p> Motion in Limine (9:00 AM) (Judicial Officer: Gonzalez, Elizabeth) <i>Apco Construction, Inc. And Safeco Insurance Company Of America's Motion In Limine No. 3 To Preclude The Introduction Of Evidence Related To Helix's Extended General Conditions And Motion In Limine No. 4 To Preclude Any Evidence Of Helix's Accounting Data Or Job Cost Reports</i> Vacated due to department reassignment. Hearing will be rescheduled. parties' agreement Denied; Journal Entry Details: <i>APPEARANCES CONTINUED: Joe Pelan, Client Representative for Defendant. Following arguments by counsel, COURT ORDERED, the Motions in Limine are both DENIED. While the issue related to the 30(b)(6) would be of concern the Court will treat that as a credibility issue as to the knowledge of the witness who appeared. The entire job cost report needs to be produced immediately, and if there are any issues related to the job cost report when counsel receives it, the Court will have a discussion about the timing of trial. Mr. Domina stated the job cost report will be generated this week. 5-14-19 9:30 AM CALENDAR CALL 5-28-19 1:30 PM BENCH TRIAL;</i></p>
05/14/2019	<p> Calendar Call (9:30 AM) (Judicial Officer: Gonzalez, Elizabeth) Trial Date Set; Journal Entry Details: <i>Parties announced ready and anticipated trial taking 2 to 3 days. COURT ORDERED, bench trial set to COMMENCE on Monday, June 3, 2019. 6-3-19 10:30 AM BENCH TRIAL;</i></p>
06/03/2019	<p> Motion (10:15 AM) (Judicial Officer: Gonzalez, Elizabeth) Events: 05/22/2019 Motion to Exclude <i>APCO Construction, Inc. and Safeco Insurance Company of America's Motion to Exclude the Testimony of Kurt Williams on Order Shortening Time</i> Denied; Journal Entry Details: <i>Following arguments by Mr. Jefferies and Mr. Holmes, COURT ORDERED, motion DENIED. While the Court understands the issues of the challenge of producing someone for a 30(b)(6), the corporation cannot be forced to provide a former employee. 6-3-19 10:30 AM BENCH TRIAL;</i></p>
06/03/2019	<p> Bench Trial (10:30 AM) (Judicial Officer: Gonzalez, Elizabeth)</p>

CASE SUMMARY

CASE NO. A-16-730091-B

06/03/2019-06/05/2019

MINUTES

Trial Continues;

Trial Continues;

Decision Made;

Journal Entry Details:

DAY 3 APPEARANCES CONTINUED: Robert "Bob" Johnson, Vice President of Helix Electric of Nevada, LLC; Joe Pelan, Client Representative for APCO Construction. Testimony and exhibits presented. (See worksheet.) RECESS. Testimony and exhibits continued. (See worksheet.) At the hour of 11:20 am, Defendant RESTED. Closing arguments by Mr. Domina and Mr. Jefferies. COURT ORDERED, matter taken UNDER ADVISEMENT and status check SET on the Court's decision. 6-21-19 CHAMBERS STATUS CHECK: DECISION;

Trial Continues;

Trial Continues;

Decision Made;

Journal Entry Details:

DAY 2 APPEARANCES CONTINUED: Victor Fuchs, President of Helix Electric of Nevada, LLC; Robert "Bob" Johnson, Vice President of Helix Electric of Nevada, LLC; Joe Pelan, Client Representative for APCO Construction. Testimony and exhibits presented. (See worksheet.) RECESS. Testimony and exhibits continued. (See worksheet.) LUNCH RECESS. Proceeding resumed. Testimony and exhibits presented. (See worksheet.) RECESS. At the hour of 2:37 pm, Plaintiff RESTED. Defendant's case in chief commenced. Testimony and exhibits continued. (See worksheet.) COURT ORDERED, trial CONTINUED. EVENING RECESS. 6-4-19 9:00 AM BENCH TRIAL;

MINUTES

Trial Continues;

Trial Continues;

Decision Made;

Journal Entry Details:

DAY 1 APPEARANCES CONTINUED: Bob Johnson, Vice President of Helix Electric of Nevada, LLC; Joe Pelan, Client Representative for APCO Construction. COURT ORDERED, all Proposed Joint Exhibits ADMITTED per stipulation, except for Proposed Joint Exhibit JX044 as objected to and for Proposed Joint Exhibit JX045 as not used. Counsel advised Plaintiff's and Defendants' Proposed Exhibits are all objected to at this point. Opening statements by Mr. Domina and Mr. Jefferies. EXCLUSIONARY RULE INVOKED. Testimony and exhibits presented. (See worksheet.) LUNCH RECESS. Proceeding resumed. Testimony and exhibits presented. (See worksheet.) RECESS. Testimony and exhibits continued. (See worksheet.) COURT ORDERED, trial CONTINUED. EVENING RECESS. 6-3-19 9:15 AM BENCH TRIAL;

06/21/2019



Status Check (3:00 AM) (Judicial Officer: Gonzalez, Elizabeth)

06/21/2019, 07/05/2019

Status Check: Court's Decision

Matter Continued;

Off Calendar;

Journal Entry Details:

See Findings of Fact and Conclusions of Law filed 7/8/19.;

Matter Continued;

Off Calendar;

Journal Entry Details:

COURT ORDERED, status check CONTINUED two weeks. CONTINUED TO : 7/5/2019 (CHAMBERS) CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Nicole McDevitt, to all registered parties for Odyssey File & Serve. /nm 6/21/2019;

08/19/2019

Motion for Clarification (9:00 AM) (Judicial Officer: Gonzalez, Elizabeth)

APCO Construction, Inc.'s and Safeco Insurance Company of America's Motion for Clarification and/or Amendment to Findings of Fact and Conclusions of Law oral argument requested



Denied;

08/19/2019

Opposition and Countermotion (9:00 AM) (Judicial Officer: Gonzalez, Elizabeth)

Plaintiff Helix Electric of Nevada, LLC's (I) Opposition to APCO Construction, Inc.'s and Safe

CASE SUMMARY**CASE NO. A-16-730091-B**

	<i>Insurance Company of America's Motion for Clarification and/or Amendment to Findings of Fact and Conclusions of Law; and (II) Countermotion for Amendment to Findings of Fact and Conclusions of Law</i> Denied;
08/19/2019	 All Pending Motions (9:00 AM) (Judicial Officer: Gonzalez, Elizabeth) Matter Heard; Journal Entry Details: <i>APCO CONSTRUCTION, INC.'S AND SAFECO INSURANCE COMPANY OF AMERICA'S MOTION FOR CLARIFICATION AND/OR AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW...PLAINTIFF HELIX ELECTRIC OF NEVADA, LLC'S (I) OPPOSITION TO APCO CONSTRUCTION, INC.'S AND SAFE INSURANCE COMPANY OF AMERICA'S MOTION FOR CLARIFICATION AND/OR AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW; AND (II) COUNTERMOTION FOR AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS AF LAW Following arguments by counsel, COURT ORDERED both motions DENIED. 9-9-19 9:00 AM HELIX ELECTRIC OF NEVADA, LLC'S MOTION FOR ATTORNEY'S FEES, COSTS, AND INTEREST;</i>
09/30/2019	 Motion for Attorney Fees and Costs (9:00 AM) (Judicial Officer: Gonzalez, Elizabeth) 09/30/2019, 10/04/2019 <i>Helix Electric of Nevada, LLC's Motion for Attorney's Fees, Costs and Interest</i> Continued for Chambers Decision; chart re: fees to be provided Granted in Part; Journal Entry Details: <i>Court reviewed supplement. The attorney's fees of Mr. Domina, Mr. Cox, and Ms. Hansen are AWARDED. The Court has determined that there was duplication of work among other referenced counsel as well as administrative tasks billed and has reduced the requested fee award to those timekeepers. Mr. Domina to submit an order. CLERK'S NOTE: A copy of this minute order was distributed via Odyssey File and Serve. / dr 10-4-19;</i> Continued for Chambers Decision; chart re: fees to be provided Granted in Part; Journal Entry Details: <i>Following arguments by counsel, COURT ORDERED, \$14,927.58 in interest and \$8,949.40 in costs AWARDED. Motion CONTINUED to the chambers calendar for Friday, October 4th, for counsel for Plaintiff to PROVIDE a chart with the time keeper, rate, number of hours, and total amount billed on attorney's fees. 10-4-19 CHAMBERS HELIX ELECTRIC OF NEVADA, LLC'S MOTION FOR ATTORNEY'S FEES, COSTS, AND INTEREST ;</i>

DATE**FINANCIAL INFORMATION**

Defendant APCO Construction	
Total Charges	694.50
Total Payments and Credits	694.50
Balance Due as of 12/10/2019	0.00
Defendant Safeco Insurance Company of America	
Total Charges	7.00
Total Payments and Credits	7.00
Balance Due as of 12/10/2019	0.00
Plaintiff Helix Electric of Nevada LLC	
Total Charges	1,983.50
Total Payments and Credits	1,983.50
Balance Due as of 12/10/2019	0.00

DISTRICT COURT CIVIL COVER SHEET

A-16-730091-C

County, Nevada

XVI I

Case No.

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): Helix Electric of Nevada, LLC	Defendant(s) (name/address/phone): APCO Construction; Safeco Insurance Company of America
Attorney (name/address/phone): Cary B. Domina, Esq. Peel Brimley LLP 3333 E. Serene Avenue, Suite 200 Henderson NV 89074 702-990-7272	Attorney (name/address/phone):

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input checked="" type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ	Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters	

Business Court filings should be filed using the Business Court civil coversheet.

1/12/16
Date

Signature of initiating party or representative

See other side for family-related case filings.

BUSINESS COURT CIVIL COVER SHEET

CLARK

A-16-730091-C

County, Nevada

Case No. A-16-730091-C
(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): <div style="text-align: center;">Helix Electric of Nevada, LLC</div>	Defendant(s) (name/address/phone): <div style="text-align: center;">APCO Construction</div> <div style="text-align: center;">Safeco Insurance Company of America</div>
Attorney (name/address/phone): <div style="text-align: center;">Cary B. Domina, Esq (10567) Phone: (702) 990-7272</div> <div style="text-align: center;">PEEL BRIMLEY LLP</div> <div style="text-align: center;">3333 E. Serene Ave, Suite 200</div> <div style="text-align: center;">Henderson, NV 89074</div>	Attorney (name/address/phone): <div style="text-align: center;">John Randall Jeffries, Esq. (3512)</div> <div style="text-align: center;">Mary Bacon, Esq. (12686)</div> <div style="text-align: center;">SPENCER FANE LLP (702) 408-3411</div> <div style="text-align: center;">300 S. Fourth Street, Suite 950, Las Vegas, NV 89101</div>

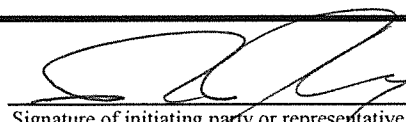
II. Nature of Controversy (Please check the applicable boxes for both the civil case type and business court case type)

☐ Arbitration Requested

Civil Case Filing Types		Business Court Filing Types		
Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input checked="" type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Torts Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort Civil Writs <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ	CLARK COUNTY BUSINESS COURT <input type="checkbox"/> NRS Chapters 78-89 <input type="checkbox"/> Commodities (NRS 91) <input type="checkbox"/> Securities (NRS 90) <input type="checkbox"/> Mergers (NRS 92A) <input type="checkbox"/> Uniform Commercial Code (NRS 104) <input type="checkbox"/> Purchase/Sale of Stock, Assets, or Real Estate <input type="checkbox"/> Trademark or Trade Name (NRS 600) <input type="checkbox"/> Enhanced Case Management <input checked="" type="checkbox"/> Other Business Court Matters WASHOE COUNTY BUSINESS COURT <input type="checkbox"/> NRS Chapters 78-88 <input type="checkbox"/> Commodities (NRS 91) <input type="checkbox"/> Securities (NRS 90) <input type="checkbox"/> Investments (NRS 104 Art.8) <input type="checkbox"/> Deceptive Trade Practices (NRS 598) <input type="checkbox"/> Trademark/Trade Name (NRS 600) <input type="checkbox"/> Trade Secrets (NRS 600A) <input type="checkbox"/> Enhanced Case Management <input type="checkbox"/> Other Business Court Matters		
Judicial Review/Appeal/Other Civil Filing <table style="width: 100%;"> <tr> <td style="width: 50%;"> Judicial Review <input type="checkbox"/> Foreclosure Mediation Case Appeal Other <input type="checkbox"/> Appeal from Lower Court </td> <td style="width: 50%;"> Other Civil Filing <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters </td> </tr> </table>		Judicial Review <input type="checkbox"/> Foreclosure Mediation Case Appeal Other <input type="checkbox"/> Appeal from Lower Court	Other Civil Filing <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters	
Judicial Review <input type="checkbox"/> Foreclosure Mediation Case Appeal Other <input type="checkbox"/> Appeal from Lower Court	Other Civil Filing <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters			

January 28, 2019

Date


 Signature of initiating party or representative

ORIGINAL

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Steven D. Grierson
CLERK OF THE COURT

Steven D. Grierson

JUDG
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Attorneys for Plaintiff
Helix Electric of Nevada, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

HELIX ELECTRIC OF NEVADA, LLC, a
Nevada limited liability company,

Plaintiff,

vs.

APCO CONSTRUCTION, a Nevada corporation;
SAFECO INSURANCE COMPANY OF
AMERICA; DOES I through X; and BOE
BONDING COMPANIES I through X,

Defendants.

CASE NO. : A-16-730091-B
DEPT. NO.: XI

FINAL JUDGMENT

This matter having come before the Honorable Elizabeth Gonzalez on for a non-jury trial beginning on June 3, 2019, and continuing day to day, until its completion on June 5, 2019; Plaintiff HELIX ELECTRIC OF NEVADA, LLC ("Helix"), was represented by and through its counsel, Cary B. Domina, Esq. and Ronald J. Cox, Esq., of the law firm of Peel Brimley LLP, and Defendants APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF AMERICA ("Safeco"), were represented by and through their counsel, Randy Jeffries, Esq. of Fennemore Craig; the Court having read and considered the pleadings filed by the parties; having reviewed the evidence admitted during the trial; having heard and carefully considered the

1 testimony of the witnesses called to testify; having considered the oral and written arguments of
2 counsel, and with the intent of rendering a decision on all remaining claims before the Court
3 pursuant to NRCp 52(a) and 58, the Court hereby enters its Final Judgment pursuant to the Court's
4 Findings of Fact and Conclusions of Law¹ and the Court's ruling on Helix's Motion for Fees, Costs
5 and Interest as follows:

- 6 1. **IT IS HEREBY ORDERED** that, as to Helix's Claims for Breach of Contract and
7 Breach of the Implied Covenant of Good Faith and Fair Dealing against APCO, this
8 Court finds in favor of Helix and awards damages in the amount of \$43,992.39 together
9 with interest as provided by law and taxable costs of suit;
- 10 2. **IT IS FURTHER ORDERED** that, as to Helix's Claim for violations of NRS 338
11 against APCO, this Court finds in favor of Helix in the amount of \$1,960.85;
- 12 3. **IT IS FURTHER ORDERED** that, as to Helix's Motion for Attorney's Fees, Costs
13 and Interest, after careful consideration of the parties' briefing and the *Brunzell*² factors,
14 the Court awards Helix attorney's fees for the work provided by Cary B. Domina, Esq.,
15 Ronald J. Cox, Esq., and Terri Hansen only, in the amount of \$149,336.06, as the Court
16 believes the remaining requested fees were duplicative and should not be awarded. The
17 Court finds that the amount awarded is reasonable considering the qualifications of
18 Helix's counsel, the character of the work performed, the number of dispositive motions
19 filed in this matter that Helix successfully defended itself against, as well as the
20 favorable result obtained by Helix at trial.
- 21 4. **IT IS FURTHER ORDERED** that, the Court awards Helix its costs in the amount of
22 \$8,949.40, and interest in the amount of \$14,927.58.
- 23 5. **IT IS FURTHER ORDERED** that Judgment is hereby entered in favor of Helix and
24 against APCO and Safeco in the total amount of **\$219,166.28**.

25 ///

26 ///

27 ///

28 ¹ The Court's Findings of Fact and Conclusions of Law are incorporated herein to support the Court's Final Judgment.

² See *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

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6. Any claim not otherwise disposed of by this decision is dismissed.


IT IS SO ORDERED

Dated this 4 ^{November}~~October~~, 2019.


DISTRICT COURT JUDGE


Approved as to Form and Content:

FENNEMORE CRAIG P.C.


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APCO Construction and Safeco
Insurance Company of America

Submitted by:

PEEL BRIMLEY LLP


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11 cdomina@peelbrimley.com
12 jholmes@peelbrimley.com
13 *Attorneys for Plaintiff*
14 *Helix Electric of Nevada, LLC*

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 HELIX ELECTRIC OF NEVADA, LLC, a
18 Nevada limited liability company,

CASE NO. : A-16-730091-C
DEPT. NO. : XI

19 Plaintiff,

20 vs.

21 APCO CONSTRUCTION, a Nevada corporation;
22 SAFECO INSURANCE COMPANY OF
23 AMERICA; DOES I through X; and BOE
24 BONDING COMPANIES I through X,


25 Defendants.

26 **NOTICE OF ENTRY OF FINAL JUDGMENT**

27 PLEASE TAKE NOTICE that a Final Judgment entered November 4, 2019 and filed on
28 **November 6, 2019**, a copy of which is attached as Exhibit 1.

Dated this 6th day of November, 2019.

PEEL BRIMLEY LLP



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JEREMY HOLMES, ESQ. (14379)
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 14 day of November, 2019, I caused the above and foregoing document, **NOTICE OF ENTRY OF FINAL JUDGMENT**, to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☒ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____

to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

Attorneys for APCO Construction and Safeco Insurance Co.
John Randall Jefferies, Esq. (rjefferies@fclaw.com)
Brandi M. Planet, Esq. (bplanet@fclaw.com)

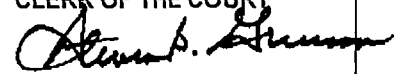


An employee of **PEEL BRIMLEY, LLP**

EXHIBIT 1

ORIGINAL

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Steven D. Grierson
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JUDG
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Attorneys for Plaintiff
Helix Electric of Nevada, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

HELIX ELECTRIC OF NEVADA, LLC, a
Nevada limited liability company,

Plaintiff,

vs.

APCO CONSTRUCTION, a Nevada corporation;
SAFECO INSURANCE COMPANY OF
AMERICA; DOES I through X; and BOE
BONDING COMPANIES I through X,

Defendants.

CASE NO. : A-16-730091-B
DEPT. NO. : XI

FINAL JUDGMENT

This matter having come before the Honorable Elizabeth Gonzalez on for a non-jury trial beginning on June 3, 2019, and continuing day to day, until its completion on June 5, 2019; Plaintiff HELIX ELECTRIC OF NEVADA, LLC ("Helix"), was represented by and through its counsel, Cary B. Domina, Esq. and Ronald J. Cox, Esq., of the law firm of Peel Brimley LLP, and Defendants APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF AMERICA ("Safeco"), were represented by and through their counsel, Randy Jeffries, Esq. of Fennemore Craig; the Court having read and considered the pleadings filed by the parties; having reviewed the evidence admitted during the trial; having heard and carefully considered the

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1 testimony of the witnesses called to testify; having considered the oral and written arguments of
2 counsel, and with the intent of rendering a decision on all remaining claims before the Court
3 pursuant to NRCP 52(a) and 58, the Court hereby enters its Final Judgment pursuant to the Court's
4 Findings of Fact and Conclusions of Law¹ and the Court's ruling on Helix's Motion for Fees, Costs
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- 6 1. **IT IS HEREBY ORDERED** that, as to Helix's Claims for Breach of Contract and
7 Breach of the Implied Covenant of Good Faith and Fair Dealing against APCO, this
8 Court finds in favor of Helix and awards damages in the amount of \$43,992.39 together
9 with interest as provided by law and taxable costs of suit;
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15 Ronald J. Cox, Esq., and Terri Hansen only, in the amount of \$149,336.06, as the Court
16 believes the remaining requested fees were duplicative and should not be awarded. The
17 Court finds that the amount awarded is reasonable considering the qualifications of
18 Helix's counsel, the character of the work performed, the number of dispositive motions
19 filed in this matter that Helix successfully defended itself against, as well as the
20 favorable result obtained by Helix at trial.
- 21 4. **IT IS FURTHER ORDERED** that, the Court awards Helix its costs in the amount of
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- 23 5. **IT IS FURTHER ORDERED** that Judgment is hereby entered in favor of Helix and
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² See *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

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6. Any claim not otherwise disposed of by this decision is dismissed.

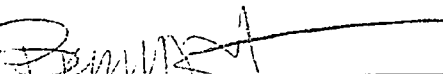
IT IS SO ORDERED

Dated this 4 day of ^{November}~~October~~, 2019.


DISTRICT COURT JUDGE


Approved as to Form and Content:

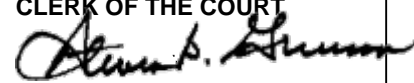
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APCO Construction and Safeco
Insurance Company of America

Submitted by:

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Attorneys for Plaintiff
Helix Electric of Nevada, LLC



1 FFCL

2
3 DISTRICT COURT

4 CLARK COUNTY, NEVADA

5 HELIX ELECTRIC OF NEVADA, LLC, a
6 Nevada limited liability company,

7 Plaintiff,

8 v.

9
10 APCO CONSTRUCTION, a Nevada
11 corporation; SAFECO INSURANCE
12 COMPANY OF AMERICA; DOES I through
13 X; and BOE BONDING COMPANIES, I
14 through X,

15 Defendants.

Case No.: A-16-730091-C

Dept.: XI

16 ***FINDINGS OF FACT AND CONCLUSIONS OF LAW***

17 This matter having come on for non-jury trial before the Honorable Elizabeth Gonzalez
18 beginning on June 3, 2019, and continuing day to day, until its completion on June 5, 2019;
19 Plaintiff, HELIX ELECTRIC OF NEVADA, LLC ("Helix"), was represented by and through its
20 counsel, Cary B. Domina, Esq. and Ronald J. Cox, Esq. of the law firm of Peel Brimley LLP, and
21 Defendants, APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF
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23 Fennemore Craig; the Court having read and considered the pleadings filed by the parties; having
24 reviewed the evidence admitted during the trial; having heard and carefully considered the
25 testimony of the witnesses called to testify; having considered the oral and written arguments of
26 counsel, and with the intent of rendering a decision on all remaining claims before the Court,

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CLERK OF THE COURT

1 pursuant to NRCP 52(a) and 58;¹ the Court makes the following findings of fact and conclusions
2 of law:

3
4 FINDINGS OF FACT

5 1. In July 2011, APCO submitted a bid for the Craig Ranch Regional Park – Phase II
6 - Project No. 10294 (“Project”) to the City of North Las Vegas (“CNLV”). At that time, the
7 anticipated Project duration was approximately 550 calendar days.

8 2. Helix submitted a bid of approximately \$4,600,000 to APCO for the electrical
9 work required on the Project. Helix’s estimate assumed a Project duration of 550 days.

10 3. CNLV canceled the original solicitation and ultimately requested a second round
11 of bids in October 2011. Among other things, CNLV changed the duration of the Project from 18
12 months to 12 months.

13 4. On or about October 26, 2011, APCO submitted its second bid to CNLV for the
14 Project with a 12-month schedule.

15 5. CNLV issued its notice to proceed to APCO on January 11, 2012. APCO started
16 work on the Project on approximately January 16, 2012.

17 6. Helix mobilized its equipment and started work full time on or about February 20,
18 2012.

19 7. In the spring of 2012, APCO entered into a construction agreement (the “Prime
20 Contract”) with the CNLV in which APCO agreed to serve as the general contractor on the
21 Project.

22 8. Section 6.3.2 the General Conditions of the Prime Contract which are incorporated
23 into the Subcontract, states in part:

24
25
26
27 ¹ In the pretrial statement, the parties have stipulated that the Contract time was extended from January 2013
28 into November 2013 through no fault of either APCO or Helix.

1 [a]ll other claims notices for extra work shall be filed in writing to the Construction
2 Manager prior to the commencement of such work. Written notices shall use the words
3 "Notice of Potential Claim." Such Notice of Potential Claim shall state the circumstances
4 and all reasons for the claim, but need not state the amount.

5 9. After receiving the notice of proposed award, APCO agreed to contract terms with
6 Helix subject to certain specially negotiated terms modifying the form subcontract ("Helix
7 Addendum").

8 10. As part of the negotiation, APCO agreed to purchase certain materials totaling
9 \$2,248,248 as specified by Helix, which was to be removed from Helix's original proposed scope
10 and pricing.

11 11. Helix entered into an agreement with APCO to provide certain electrical related
12 labor, materials and equipment (the "Work") to the Project for the lump sum amount of
13 \$2,356,520.

14 12. On or about April 19, 2012, APCO and Helix entered into a formal subcontract for
15 the electrical work required on the Project (the "Subcontract").

16 13. Helix's Daily Reports, Certified Pay Roll Records and the Project Sign-in Sheets
17 establish that Helix started performing work for the Project as early as January 23, 2012, and
18 mobilized on the Project on or about February 28, 2012.

19 14. Pursuant to Exhibit "A" of the Subcontract, Helix was required to supply "all
20 labor, materials, tools, equipment, hoisting, forklift, supervision, management, permits and taxes
21 necessary to complete all of the scope of work" for the 'complete electrical package' for the
22 Project.
23

24 15. Section 6.5 contains a "no damage for delay" provision.

25
26 If Subcontractor shall be delayed in the performance of the Work by any act or neglect of
27 the Owner or Architect, or by agents or representatives of either, or by changes ordered in
28 the Work, or by fire, unavoidable casualties, national emergency, or by any cause other
that [SIC] the intentional Interference of Contractor, Subcontractor shall be entitled, as
Subcontractor's exclusive remedy, to an extension of time reasonably necessary to

1 compensate for the time lost due to the delay, but only if Subcontractor shall notify
2 Contractor in writing within twenty four (24) hours after such occurrences, and only if
3 Contractor shall be granted such time extension by Owner.

4 This clause was not modified by the Helix Addendum.

5 16. Section 6.7 of the Subcontract provided in pertinent part:

6 Contractor shall not be liable to Subcontractor for delays caused by reason of fire or other
7 casualty, or on account of riots, strikes, labor trouble, terrorism, acts of God, cataclysmic
8 event, or by reason of any other event or cause beyond Contractor's control, or
9 contributed to by Subcontractor.

10 Section 6.7 was not modified by the Helix Addendum.

11 17. The Parties Contract requires proof of actual cost increase. Section 7.1—which
12 was unchanged by the Helix Addendum—provides:

13 Contractor may order or direct changes, additions, deletions or other revisions in the
14 Subcontract work without invalidating the Subcontract. No changes, additions, deletions,
15 or other revisions to the Subcontract shall be valid unless made in writing. Subcontractor
16 markup shall be limited to that stated in the contract documents in addition to the
17 direct/actual on-site cost of the work, however, no profit and overhead markup on
18 overtime shall be allowed.

19 18. Section 7.2 as modified by the Helix Addendum, provided:

20 Subcontractor, prior to the commencement of such changed or revised work, shall submit,
21 (within 5 days of Contractor's written request) to Contractor, written copies of the
22 breakdown of cost or credit proposal, including work schedule revisions, for changes,
23 additions, deletions, or other revisions in a manner consistent with the Contract
24 Documents. Contractor shall not be liable to Subcontractor for a greater sum, or
25 additional time extensions, than Contractor obtains from Owner for such additional work.

26 19. The parties negotiated additional language that was included in Section 6 by the
27 Helix Addendum:

28 In the event the schedule as set forth above is changed by Contractor for whatever reason
so that Subcontractor either is precluded from performing the work in accordance with
said schedule and thereby suffers delay, or, is not allowed the number of calendar days to
perform the work under such modified schedule and must accelerate its performance, then
Subcontractor shall be entitled to receive from Contractor payment representing the costs
and damages sustained by Subcontractor for such delay or acceleration, providing said
costs and damages are first paid to Contractor.

20. Section 4.4 of the Subcontract—as amended by the Helix Addendum provides:

1 Progress payments will be made by Contractor to Subcontractor within 10 calendar days
2 after Contractor actually receives payment for Subcontractor's work from Owner. The
3 progress payment to Subcontractor shall be one hundred percent (100%) of the value of
4 Subcontract work completed (less 10% retention) during the preceding month as
5 determined by the Owner, less such other amounts as Contractor shall determine as being
6 properly withheld as allowed under this Article or as provided elsewhere in this
7 Subcontract. The estimates of Owner as to the amount of Work completed by
8 Subcontractor shall be binding upon Contractor and Subcontractor and shall conclusively
9 establish the amount of Work performed by Subcontractor. As a condition precedent to
10 receiving partial payments from Contractor for Work performed, Subcontractor shall
11 execute and deliver to Contractor, with its application for payment, a full and complete
12 release (Forms attached) of all claims and causes of action Subcontractor may have
13 against Contractor and Owner through the date of the execution of said release, save and
14 except those claims specifically listed on said release and described in a manner sufficient
15 for Contractor to identify such claim or claims with certainty. Upon the request of
16 Contractor, Subcontractor shall provide an Unconditional Waiver of Release in form
17 required by Contractor for any previous payment made to Subcontractor. Any payments
18 to Subcontractor shall be conditioned upon receipt of the actual payments by Contractor
19 from Owner. Subcontractor herein agrees to assume the same risk that the Owner may
20 become insolvent that Contractor has assumed by entering into the Prime Contract with
21 the Owner per NRS Statutes.

22 21. The Subcontract also incorporated the Prime Contract, which included the claim
23 procedures set forth in the Contract.

24 22. Helix assigned Kurk Williams as its Project Manager. Williams never signed in
25 using APCO's sign in sheets that were maintained at the Project site. By his own admission,
26 Williams' time devoted to the Project was not accurately tracked in Helix's certified payroll
27 reports, only Helix's job cost report.

28 23. Richard Clement was Helix's Project Superintendent. Clement was on site
occasionally and signed in with APCO at the Project twice during 2012.

24 24. Clement did not work on the Project between June 11, 2012 and September 26,
25 2012. Clement only worked two weeks on the Project from September 27, 2012 to October 7,
26 2012. Clement did not work on the Project from October 8, 2012 through January 20, 2013. In
27 all of 2013, which was the extended Project time, Clement only worked 32 hours during the week
28 ending January 27, 2013.

1 25. In late January 2013, Helix assigned Clement to another project and designated
2 Rainer Prietzel, Helix's Foreman to oversee work in the field, as the new Project Superintendent
3 and foreman.

4 26. According to the Labor Commissioner, and OSHA regulations, Helix must always
5 have a project superintendent on site at all times during the Project.
6

7 27. From January 2013 to May 2013, Helix typically had a three to five man crew on
8 the Project.

9 28. In early May 2013, with the exception of a few days, Prietzel was the only Helix
10 employee on the Project, and he split his time as the Project Superintendent and self-performing
11 contract and change order work on the Project.

12 29. Prietzel remained the Project Superintendent until the end of the Project in mid-
13 October 2013.
14

15 30. Helix's original line item for its general conditions, as reflected in its pay
16 application, was \$108,040 on a Subcontract price of \$2,380,085, which represents 4.5%.

17 31. The Project encountered significant delays and was not substantially completed
18 until October 25, 2013, thus resulting in Helix claiming approximately, \$138,000 in additional
19 extended overhead costs.

20 32. The project was never abandoned by CNLV.
21

22 33. Prior to the original project completion date passing, on January 9, 2013, APCO
23 submitted its first request for an extension of time to CNLV. APCO submitted its Time Impact
24 Analysis #1 ("TIA #1") to CNLV where it sought extended general conditions and home office
25 overhead of \$418,059 (\$266,229 for general conditions and \$151,830 for home office overhead).

26 34. Helix first notified APCO in writing that it would be asserting a claim for extended
27 overhead costs on January 28, 2013 and reserved its rights to submit a claim for "all additional
28

1 costs incurred due to scheduled delays for this project” (the “Claim”).

2 35. As of May 9, 2013, CNLV had not made a decision on APCO’s TIA #1.

3 36. On May 9, 2013, APCO submitted a revised Time Impact Analysis (“TIA #2”) to
4 CNLV seeking an additional five (5) months of compensation for general conditions and home
5 office overhead, among other claims, for a total delay claim of nine (9) months.
6

7 37. As part of TIA #2, APCO submitted Change Order Request No. 39.1 to CNLV
8 seeking compensation of \$752,499 for its extended general conditions and home office overhead
9 (\$479,205 for general conditions and \$273,294 for home office overhead).

10 38. This represented approximately seventy percent (70%) of APCO’s \$1,090,066.50
11 total claim against CNLV for the 9-month delay to the Project.
12

13 39. APCO’s claim did not include any amounts for its subcontractors, and APCO
14 acknowledges that as a company policy, it does not include its subcontractors’ claims with its
15 own claims.

16 40. Through no fault of APCO, Helix did not take delivery of various light poles and
17 related equipment until approximately January 30, 2013.

18 41. On June 19, 2013, APCO and Helix exchanged emails regarding various Project
19 issues, including Helix’s delay rates. APCO confirmed that if Helix submitted a request for
20 compensation that it would be forwarded to CNLV.
21

22 42. On June 19, 2013 Helix provided a supplemental notice of claim but did not
23 provide any back up to support its daily rates or the impacts alleged to be attributed to the delay.
24 At that time, Helix still only had Prietzel working on site.

25 43. On June 21, 2013 Helix and APCO exchanged emails related to the support for
26 Helix’s claimed costs, with APCO noting that a project manager was considered home office
27 overhead. Helix indicated that its job cost reports would reflect the actual costs for the extended
28

1 overhead.

2 44. In June 2013, Helix realized the Project was still several months away from being
3 completed. According to Helix's June 19 letter entitled "Extended overhead cost", Helix's cost
4 for extended overheard was \$640/day.

5 45. The \$640/day cost is comprised of (1) \$260 for the Project Manager; (2) \$280 for
6 the Superintendent; (3) \$25 for the site trailer; (4) \$5 for the Connex box; (5) \$25 for the forklift;
7 and (6) \$45 for the truck.

8 46. The email that accompanied Helix's June 19, 2013 letter advised APCO that to
9 date, Helix's Claim totaled \$72,960, but that Helix's Claim would increase for each day the
10 Project continued past the original completion date.

11 47. Also on June 19, 2013, APCO informed Helix, by way of an email, that it "is in
12 the process of presenting CNLV with a Time Impact Analysis containing facts as to why the
13 additional costs should be paid." APCO had submitted TIA #2 to CNLV on May 9, 2013, six
14 weeks prior to this email.

15 48. In the email, APCO further advised Helix that "[o]nce we fight the battle, and
16 hopefully come out successfully, this will open the door for Helix...to present their case for the
17 same."

18 49. While APCO notified Helix that it would forward to CNLV any letter Helix
19 provided regarding its claim for extended overhead costs, APCO did not inform Helix that it
20 needed Helix's Claim immediately so it could include it with APCO's claim to CNLV. Indeed,
21 according to APCO, it would first "fight that battle, and hopefully come out successfully..."
22 which would only then "open the door for Helix...to present their case..."

23 50. On August 27, 2013, despite the fact that the Project was still ongoing, Helix
24 furnished APCO with its first invoice for its Claim in the amount of \$102,400, which constituted
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1 32 weeks of extended overhead costs incurred between January 13, 2013, and August 30, 2013
2 (or 160 business days).

3 51. Helix's invoice identified an extended overhead cost of \$640/day for 32 weeks,
4 which had been provided to APCO in June 2013.

5 52. From May 6, 2013 through November 6, 2013, Prietzel was the only Helix person
6 on site. Prietzel confirmed that during that time period he was either working on completing
7 original Subcontract work for which Helix would be paid or change order work that was
8 acknowledged and paid by APCO and CNLV.

9 53. During construction, CNLV made changes or otherwise caused issues that
10 impacted Helix. In those instances, Helix submitted a request for additional compensation and
11 CNLV issued APCO change orders that compensated Helix for the related impacts. During the
12 extended Contract time, CNLV issued eleven change orders that resulted in additional
13 compensation to Helix through the Subcontract. Helix's pricing for the change orders included a
14 10% markup on materials and a 15% markup on labor to cover Helix's overhead.

15 54. APCO submitted Change Order Request No. 68 ("COR 68") to CNLV on
16 September 9, 2013, requesting compensation for Helix's Claim.

17 55. On September 16, 2013, CNLV rejected the COR 68 stating, "This COR is
18 REJECTED. The City of North Las Vegas does not have a contract with Helix Electric."

19 56. CNLV stated that it did not reject COR 68 for lack of backup or untimeliness.

20 57. The Construction Manager for CNLV during the Project, Joemel Llamado,
21 testified that the only reason he rejected Helix's Claim was because CNLV did not have a
22 contract with Helix. APCO should have included Helix's Claim in its own claim to CNLV since
23 Helix's Subcontract was with APCO, not CNLV.

24 58. Llamado did not look at the merits of the Claim because the Claim should have
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28

1 been included with APCO's claim.

2 59. APCO informed Helix that CNLV rejected COR 68 because of lack of backup
3 documentation.

4 60. On October 2, 2013, CNLV issued its decision on APCO's request for additional
5 time and compensation. CNLV determined that the time period from January 11, 2013 to May
6 10, 2013 was an excusable but not compensable delay. APCO was not charged liquidated
7 damages, but also was not provided compensation from January thru May 10, 2013. CNLV did
8 confirm that it would pay APCO \$560,724.16 for the delay from May 10, 2013 to October 25,
9 2013. APCO accepted that determination on or about October 10, 2013.

10 61. On October 3, 2013, APCO sent Helix a letter requesting additional back-up
11 documentation for the Claim so it could resubmit the Claim to CNLV.

12 62. That letter states in relevant part:

13
14 Attached is your invoice of August 27, 2013 in the amount of \$102,400. At this time
15 APCO has not received any back-up documentation to undo the previous formal rejection
16 made by the City of North Las Vegas. If you want APCO to re-submit your request,
17 please provide appropriate back-up for review.

18 63. On October 2, 2013, CNLV and APCO entered into a settlement agreement
19 through which CNLV agreed to pay APCO \$560,724.16 for its claim submitted under TIA #2,
20 including APCO's claim for added overhead and general conditions it incurred as a result of the
21 nine-month delay to the Project.

22 64. According to that settlement agreement, APCO agreed to "forgo any claims for
23 delays, disruptions, general conditions and overtime costs associated with the weekend work
24 previously performed...and for any other claim, present or future, that may occur on the project.

25 65. APCO did not notify Helix that it had entered into this settlement agreement.

26 66. Llamado's position was that the settlement agreement resolved any and all claims
27 between CNLV and APCO for the nine-month delay to the Project, including any claims APCO's
28

1 subcontractors might have.²

2 67. Pursuant to this settlement agreement, CNLV issued Change Order No. 50 to
3 APCO and agreed to pay APCO \$560,724.16 for the added overhead and general conditions it
4 incurred as a result of the extended project completion date.

5 68. On October 3, 2013, APCO transmitted to Helix CNLV's rejection of its invoice
6 for extended overhead.

7
8 69. Near the end of the Project in October 2013, Pelan, notified Helix, that Helix could
9 not include the Claim for extended overhead in Helix's pay application for retention because
10 CNLV would not release the retention on the Project if there were outstanding Claims on the
11 Project.

12 70. In compliance with Pelan's instructions, on October 18, 2013, Helix submitted its
13 Pay Application for Retention only in the amount of \$105,677.01 and identified it as Pay
14 Application No. 161113-002 (the "Retention Pay App").

15
16 71. On October 18, 2013, Helix submitted its pay application for the time period up
17 through October 30, 2013. At that time, Helix billed its general conditions line item at 100%.

18 72. On October 18, 2013, Helix submitted its pay application for the release of
19 retention. As with prior pay applications, Helix enclosed a conditional waiver. The release was
20 conditioned on APCO issuing a final payment in the amount of \$105,677.01 and expressly
21 confirmed that there were "zero" claims outstanding. Helix signed and provided that release to
22 APCO after receiving CNLV's rejection of its extended overhead invoice.

23
24 73. Helix also provided to APCO a "Conditional Waiver and Release Upon Final
25 Payment" (the "Conditional Waiver") for the Retention Pay App only (i.e. Pay App No. 161113-

26
27 ² Joe Pelan, the Contract Manager for APCO, disagreed with this position, but APCO and Helix did not test it
28 through the claims process provided in the Prime Contract.

1 002).

2 74. Helix indicated in the Conditional Waiver that there was no "Disputed Claim
3 Amount" relating to the Retention Pay App.

4 75. Helix takes the position that the Conditional Waiver was not intended to release
5 Helix's Claim.

6 76. The evidence presented at trial of the circumstances surrounding the execution of
7 the Conditional Waiver do not support Helix's waiver of the Claim.

8 77. It took APCO more than a year to pay Helix for its Retention Pay App, during
9 which time, Helix made it clear to APCO that it would continue pursuing its Claim.

10 78. Between October 2013 and the end of October 2014 when APCO finally paid
11 Helix its retention, APCO forwarded Helix's Claim to CNLV on two separate occasions and
12 received multiple written notices from Helix that it maintained its Claim against APCO.

13 79. The project was substantially completed on October 25, 2013.

14 80. On October 31, 2013, in order to account for certain overhead items that were
15 omitted from the original Claim, Helix: (i) increased its Claim from \$102,400 to \$111,847; (ii)
16 resubmitted its Invoice to APCO; and (iii) provided additional backup information and
17 documents. Included with the revised invoice was a monthly breakdown of Helix's Claim from
18 January to August, which included the following categories of damages: (1) Project Manager; (2)
19 Project Engineer; (3) Superintendent; (4) Site trucks; (5) Project Fuel; (6) Site Trailer; (7) Wire
20 Trailer; (8) Office supplies; (9) Storage Connex boxes; (10) forklifts; (11) small tools; and (12)
21 consumables. According to the summary of the Claim, Helix charged the Project 4-hours a day
22 for its Project Manager, Kurk Williams at \$65/hour, and 4-hours a day for its Superintendent, Ray
23 Prietzel at \$70/day.

24 81. On or about November 5, 2013, three weeks after APCO received Helix's
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1 Retention Pay App and Conditional Waiver, APCO submitted a revised COR 68 (68.1) to CNLV
2 seeking a total of \$111,847 for Helix's Claim.

3 82. Had APCO believed Helix's Conditional Waiver for the Retention Pay App
4 (received on October 18, 2013) waived any and all claims Helix had on the Project, including its
5 Claim for extended overhead, APCO would not have submitted revised COR 68.1 to CNLV three
6 weeks after receiving Helix's Conditional Waiver.
7

8 83. On November 18, 2013, CNLV again rejected the Change Order Request stating,
9 "This is the 2nd COR for Helix Electric's extended overhead submittal. The 1st one was submitted
10 on Sept. 9, 2013 and Rejected on Sept. 16, 2013. This submittal dated Nov. 5, 2013 is
11 REJECTED on Nov. 13, 2013."

12 84. Llamado's second rejection had nothing to do with lack of backup documents or
13 untimeliness and was rejected simply because APCO should have included Helix's Claim under
14 its own claim to CNLV.
15

16 85. By this time, APCO had already settled with CNLV to receive payment for its own
17 extended overhead costs, and in doing so, waived and released any further claims against CNLV,
18 including Helix's Claim.
19

20 86. As Helix had previously informed APCO it would, on or about November 13,
21 2013, Helix submitted to APCO another invoice including backup in the amount of \$26,304
22 accounting for the extended overhead costs for September and October ("COR 93").

23 87. APCO confirmed to Helix's Kurk Williams that there would be no APCO
24 approval unless and until CNLV approved Helix's request.

25 88. CNLV rejected COR 93.

26 89. By submitting COR 93 to CNLV on November 13, 2013, APCO once again
27 acknowledged that it knew Helix's Conditional Waiver submitted on October 18, 2013 related to
28

1 the Retention Pay App only, and did not waive Helix's Claim for extended overhead.

2 90. If APCO believed the Conditional Waiver released Helix's Claim, APCO would
3 not have continued to submit Helix's Claim to CNLV.

4 91. On January 28, 2014, APCO sent Helix's Victor Fuchs and Bob Johnson an email
5 confirming that he was meeting with CNLV to discuss the remaining change order issues on
6 February 4, 2014. Pelan testified that, CNLV advised APCO that it was rejecting Helix's claim
7 because it had no merit and Helix only had one person on the Project while completing Helix's
8 contract work in 2013. Pelan reported CNLV's position to Helix.³

9 92. The Subcontract incorporated APCO's prime contract with CNLV in Section 1.1,
10 which sets forth CNLV's claims procedure for requests for payment that are escalated to claims.
11 Helix did not request that APCO initiate these proceedings on its behalf regarding the claim for
12 extended overhead.

13 93. On March 31, 2014, CNLV and APCO agreed that there would be no further
14 COR's submitted on the Project.

15 94. On April 16, 2014, Helix's Victor Fuchs threatened to convert the outstanding
16 issues into a claim if Helix's retention was not released per its pay application and release that
17 were submitted on October 18, 2013.

18 95. APCO admitted that on June 10, 2014, it received final retention from CNLV.

19 96. However, because APCO had not paid Helix its Retention or its Claim, Helix sent
20 APCO another demand for payment on September 26, 2014, seeking payment for both its
21 Retention and the Claim.

22 97. CNLV issued the formal notice of completion of the project on July 8, 2014.

23 ³ While the Court finds Pelan's testimony on this issue credible, the testimony of Llamado
24 differs.
25
26
27
28

1 98. On October 21, 2014, APCO issued check number 1473 in the amount of
2 \$105,679, which represented final payment of Helix's retention, in accordance with the October
3 18, 2013 retention billing and related final release.⁴

4 99. On October 29, 2014, APCO sent Helix an email requesting that it sign a new
5 Conditional Waiver and Release Upon Final Payment which included Helix's Retention only, but
6 did not include any disputed amount for the Claim.
7

8 100. Attached to that email was a copy of the Retention Check APCO informed Helix it
9 could pickup once it received the new executed Conditional Release.

10 101. Upon receiving the new Conditional Waiver and before picking up the Retention
11 Check, Helix notified APCO that it was not going to sign the new Conditional Waiver without
12 reserving a right to its Claim.
13

14 102. APCO invited Helix to revise the new Conditional Waiver as it saw fit, and Helix
15 provided an unsigned copy of it seeking full payment of the Claim and the Retention for a total
16 amount of \$243,830.

17 103. APCO declined to pay the Claim, and after additional discussions between Helix
18 and APCO, it was decided that Helix would exchange for the Retention Check an Unconditional
19 Waiver and Release Upon Final Payment seeking payment of \$105,679 for Retention, and
20 reserving as its Disputed Claim, \$138,151.
21

22 104. As part of the "Disputed Claim" field, Helix referenced additional correspondence
23 which it had incorporated into the Unconditional Waiver and Release.

24 105. Helix included a letter dated October 30, 2014 clarifying that while it was
25 demanding its retention payment, it was also seeking payment for its Claim in the amount of
26

27 ⁴ Because of this lengthy delay in payment, Helix is entitled to interest on the retention amount under NRS
28 338.

1 \$138,151 for which it also provided a final invoice.

2 106. In one such email, Helix writes, "Joe, please accept this email as a 30 day
3 extension of time for the execution of [the] promissory note attached...In good faith we [are]
4 extending this time per your request, so you can come up with an arrangement to repay the
5 outstanding amount that is past due."

6
7 107. APCO never executed the Promissory Note or paid Helix its Claim.

8 108. On October 29, 2014, APCO tendered the check and another signed release for
9 final payment. That release mirrored the one that Helix submitted in October 2013.

10 109. On October 29, 2014, Helix's Victor Fuchs sent an email to Pelan stating: "this is
11 not going to work." Pelan responded that same day stating: "Victor, make changes for me to
12 approve. Thanks."

13
14 110. On October 18, 2013, the Senior Vice President of Helix, Robert D. Johnson,
15 signed a "Conditional Waiver and Release Upon Final Payment".

16 111. Helix received the funds on October 29, 2014.

17 112. On October 30, 2014, the day after negotiating the final payment check, Helix
18 tendered a signed final lien release that purported to reserve Helix's extended overhead invoices
19 in the amount of \$138,151.

20
21 113. Helix has established how certain of its costs increased due to the extended time
22 on the Project given its demobilization and reduction in crew size. Prietzel was the only person
23 on site after May 6, 2013 and he was completing base Subcontract work and change order work
24 that was paid by CNLV.

25 114. After weighing the testimony of the witnesses and a review of the admitted
26 documents, the Court finds, that the delay was not so unreasonable to amount to abandonment
27
28

1 and that therefore the provision limiting damages after a delay does not permit the recovery of
2 extended general conditions.

3 115. Since CNLV determined that the delays through May 13, 2013 were not
4 compensable, the only time period that APCO recovered payment for its delay costs was May 13,
5 2013 through October 13, 2013. During that same compensable time period, Helix's reasonable
6 costs totaled \$43,992.39.⁵ Although Helix was earning revenue and being paid during the time
7 period for the Work and certain approved change orders, APCO by its settlement with CNLV,
8 impaired Helix's ability to pursue the Claim.
9

10 116. Helix has supported its claim for certain additional costs. As Prietzel was paid for
11 his time on site under the approved change orders the claimed expense for acting as a
12 superintendent (supervising only himself) is not appropriate.
13

14 117. After weighing the testimony of the witnesses and a review of the admitted
15 documents, the Court finds, Helix has established that it suffered damages as a result of the delay
16 in project completion in the amount of \$43,992.39.

17 118. If any findings of fact are properly conclusions of law, they shall be treated as if
18 appropriately identified and designated.
19

20 CONCLUSIONS OF LAW

- 21 1. The Subcontract was a valid contract between Helix and APCO.

22
23 ⁵ The Court has utilized the summary used as D5 during the trial with the deletion of the line item
"Superintendent". Those totals for the compensable months with that modification are:

24 May 13	\$8501.05
25 June 13	\$7124.90
26 July 13	\$8270.69
27 August 13	\$6785.04
28 September 13	\$6170.56
October 13	\$7140.15
TOTAL	\$43992.39

1 2. The Court finds that the Conditional Waiver Helix submitted to APCO on or about
2 October 2013 did not constitute a waiver of Helix's Claim.

3 3. APCO's own conduct establishes that it knew Helix was not waiving its Claim as
4 it continued to submit Helix's Claim to CNLV after receiving the Conditional Waiver.

5 4. Helix provided sufficient evidence establishing that it incurred damages as a result
6 of the Project schedule extending nine months past its original completion date.

7 5. APCO had a duty to include Helix's Claim in its own claim to CNLV or otherwise
8 preserve the Claim when it settled, which it failed to do.

9 6. APCO's internal policy and decision to keep Helix's Claim separate from its own
10 claim impaired Helix's ability to pursue the Claim.

11 7. When APCO entered into the settlement agreement with CNLV on October 3,
12 2013 without Helix's knowledge, CNLV took the position that APCO waived and released any
13 and all claims arising from the nine month Project delay, including Helix's Claim.

14 8. In every contract, there is an implied covenant of good faith and fair dealing.

15 9. APCO's impairment of Helix's Claim constitutes a breach of the covenant of good
16 faith and fair dealing implied in the Subcontract.

17 10. APCO breached the covenant of good faith and fair dealing when it, without
18 notifying Helix, settled its claim with CNLV for extended general conditions, impairing Helix
19 from pursuing any pass-through claims to CNLV for its Claim, but continued to submit Helix's
20 Claim to CNLV knowing that CNLV rejected it because it had no contractual privity with Helix,
21 and now APCO had released any and all claims against CNLV.

22 11. Helix is entitled to judgment against APCO under its claim for Breach of Implied
23 Covenant of Good Faith and Fair Dealing and its damages are the damages it has established for
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1 in the amount of \$43,992.39.⁶

2 12. Because the Project was a public works project, it was governed under NRS
3 Chapter 338.

4 13. Under NRS 338.490, a conditional waiver and release can only release payments
5 for work which is the subject of the payment application to which the wavier and release
6 corresponds.
7

8 14. The Conditional Waiver Helix provided APCO on October 18, 2013, was for
9 retention only and expressly referred to the Retention Pay App (Pay Application No. 161113-022)
10 which sought retention only.

11 15. The Retention Pay App did not include Helix's Claim.

12 16. Therefore, because by statute, the Conditional Waiver can only release work that is
13 the subject of the Retention Pay App, it did not constitute a waiver and release of Helix's Claim.
14

15 17. NRS 338.565 states in relevant part:

16 If a contractor makes payment to a subcontractor or supplier more
17 than 10 days after the occurrence of any of the following acts or
18 omissions: (a) the contractor fails to pay his or her subcontractor or
19 supplier in accordance with the provisions of subsection 1 of NRS
20 338.550...the contractor shall pay to the subcontractor or supplier,
21 in addition to the entire amount of the progress bill or the retainage
22 bill or any portion thereof, interest from the 10th day on the amount
23 delayed, at a rate equal to the lowest daily prime rate...plus 2
24 percent, until payment is made to the subcontractor or supplier.

25 18. NRS 338.550(1) required APCO to pay Helix its retention within 10 days of
26 receiving its retention payment from CNLV.
27

28 ⁶ The Court has not awarded separate damages for the breach of contract claim as those would be duplicative of this award.

1 19. APCO admits it received its retention payment from CNLV on June 10, 2014, yet
2 it did not pay Helix its retention until October 30, 2014, more than four months later and in
3 violation of NRS 338.550(1).

4 20. APCO was required to pay Helix its retention amount of \$105,677.01, in addition
5 to interest at the rate of prime plus 2 percent from June 10, 2014 through October 30, 2014.
6 APCO failed to do so.

7 21. After providing APCO with the Conditional Waiver, Helix incurred additional
8 damages that could not be waived by way of the Conditional Waiver (i.e. the interest on its
9 wrongfully withheld retention).

10 22. On June 10, 2014, APCO received final retention from CNLV.

11 23. APCO failed to pay Helix its retention in the amount of \$105,679 until October 29,
12 2014.

13 24. Pursuant to NRS 338.550(1), APCO was required to pay Helix its retention no
14 later than June 21, 2014.

15 25. As a result of APCO's failure, and pursuant to NRS 338.565(1), APCO is required
16 to pay Helix interest on \$105,677.01 from June 22, 2014 through October 28, 2014, at a rate of
17 5.25% for a total of \$1,960.85.

18 26. Even if the pay-if-paid clause was enforceable, APCO cannot rely upon it to shield
19 itself from liability to Helix when its decision to submit Helix's Claim separately from its claim
20 led to CNLV rejecting Helix's Claim, and APCO's settlement with CNLV forever barred APCO
21 from receiving payment from CNLV for Helix's Claim.

22 27. To the extent the delays were caused by CNLV, APCO is still liable to Helix since
23 it impaired those claims in contradiction to NRS 624.628(3)(c) by entering into a settlement
24 agreement with CNLV on October 2, 2013.

1 28. Because this Court has found APCO breached the Subcontract and breached the
2 covenant of good faith and fair dealing, Helix is entitled to judgment against Safeco and the
3 Payment Bond as well.

4 29. NRS 339.025(1)(b) provides the following:

5
6 1. Before any contract,..., exceeding \$100,000 for any project
7 for the new construction, repair or reconstruction of any public
8 building or other public work or public improvement of any
9 contracting body is awarded to any contractor, the contractor shall
furnish to the contracting body the following bonds which become
binding upon the award of the contract to the contractor;

10 a.

11 b. A payment bond in an amount to be fixed by the
12 contracting body, but not less than 50 percent of the contract
13 amount, conditioned upon the faithful performance of the
14 contract in accordance with the plans, specifications and
15 conditions of the contract. The bond must be solely for the
protection of claimants supplying labor or materials to the
contractor to whom the contract was awarded, or to any of his
or her subcontractors, in the prosecution of the work provided
for in such contract.

16 30. NRS 339.035(1) provides:

17 ...any claimant who has performed labor or furnished material in
18 the prosecution of the work provided for in any contract for which
19 a payment bond has been given pursuant to the provisions of
20 subsection 1 of NRS 339.025, and who has not been paid in full
21 before the expiration of 90 days after the date on which the
22 claimant performed the last of such labor or furnished the last of
23 such materials for which the claimant claims payment, may bring
an action on such payment bond in his or her own name to recover
any amount due the claimant for such labor or material, and may
prosecute such action to final judgment and have execution on the
judgment.

24 31. SAFECO issued a Labor and Material Payment Bond, Bond No. 024043470,
25 wherein APCO is the principal and SAFECO is the surety.

26 32. Helix provided Work to the Project and remains unpaid for the same.

27 33. Therefore, Helix is a claimant against the Bond and may execute a judgment
28

1 against the same.

2 34. Section 20.5 of the Subcontract provides that “ [i]n the event either party employs
3 an attorney to institute a lawsuit or to demand arbitration for any cause arising out of the
4 Subcontract Work or the Subcontract, or any of the Contract Documents, the prevailing party
5 shall be entitled to all costs, attorney’s fees and any other reasonable expenses incurred therein.”
6

7 35. This provision was not modified by the Helix Addendum.

8 36. The Court finds that Helix is the prevailing party and is entitled to an award of its
9 attorneys’ fees and costs.

10 37. If any conclusions of law are properly findings of fact, they shall be treated as if
11 appropriately identified and designated.

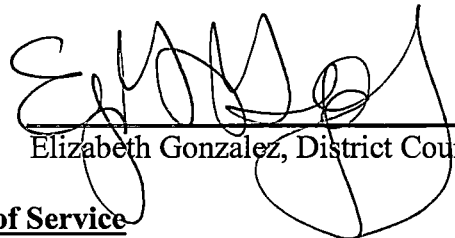
12 Based upon the foregoing Findings of Fact and Conclusions of Law **IT IS HEREBY**
13 **ORDERED, ADJUDGED AND DECREED** as follows:
14

- 15 1. **IT IS HEREBY ORDERED** that, as to Plaintiff’s Claim for Breach of Contract
16 against APCO, this Court finds in favor of Plaintiff but as the Claim was impaired
17 awards damages under the Breach of the Implied Covenant of Good Faith and
18 Fair Dealing, rather than awarding duplicative damages;
- 19 2. **IT IS FURTHER ORDERED** that, as to Plaintiff’s Claim for Breach of the
20 Implied Covenant of Good Faith and Fair Dealing against APCO, this Court finds
21 in favor of Plaintiff and awards damages in the amount of \$43,992.39 together
22 with interest as provided by law and taxable costs of suit;
- 23 3. **IT IS FURTHER ORDERED** that, as to Plaintiff’s Claim for violations of NRS
24 338 against APCO, this Court finds in favor of Plaintiff in the amount of
25 \$1,960.85;⁷
26
27

28 ⁷ These damages are in addition to those awarded under the claim of Breach of the Implied Covenant of Good

- 1 4. **IT IS FURTHER ORDERED** that, given the Court's findings against APCO,
2 the Court finds in favor of Plaintiff and against Safeco and the Bond;
3 5. **IT IS FURTHER ORDERED** that this Court will address any issues of
4 attorneys' fees through motions that may be filed with the Court.
5 6. Any claim not otherwise disposed of by this decision is dismissed.
6

7 DATED this 8th day of July, 2019.
8

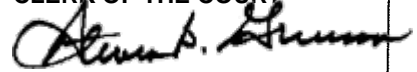
9 
10 Elizabeth Gonzalez, District Court Judge
11

12 **Certificate of Service**

13 I hereby certify that on the date filed, a copy of the foregoing Scheduling Order and
14 Order Setting Civil Jury Trial, Pre-Trial and Calendar Call was electronically served, pursuant to
15 N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing
16 Program.
17

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19 Dan Kutinac
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Faith and Fair Dealing.



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17 *HELIX ELECTRIC OF NEVADA, LLC*

18 **DISTRICT COURT**
19 **CLARK COUNTY, NEVADA**

20 HELIX ELECTRIC OF NEVADA, LLC, a
21 Nevada limited liability company,

22 Plaintiff,

23 vs.

24 APCO CONSTRUCTION, a Nevada corporation;
25 SAFECO INSURANCE COMPANY OF
26 AMERICA; DOES I through X; and BOE
27 BONDING COMPANIES I through X,

28 Defendants.

CASE NO. : A-16-730091-C
DEPT. NO. : XI

**NOTICE OF ENTRY OF FINDINGS
OF FACT AND CONCLUSIONS OF
LAW AND ORDER**

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**NOTICE OF ENTRY OF FINDINGS
OF FACT AND CONCLUSIONS OF LAW AND ORDER**

PLEASE TAKE NOTICE that the **FINDINGS OF FACT AND CONCLUSIONS OF
LAW AND ORDER** was filed on **July 8, 2019**, a copy of which is attached as Exhibit 1.

Dated this 10th day of July, 2019.

PEEL BRIMLEY LLP



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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 10th day of July, 2019, I caused the above and foregoing document, **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER**, to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☒ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____

to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

Attorneys for APCO Construction and Safeco Insurance Co.

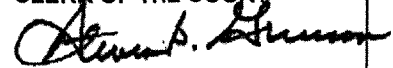
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An employee of **PEEL BRIMLEY, LLP**

EXHIBIT 1



1 FFCL

2
3 DISTRICT COURT

4 CLARK COUNTY, NEVADA

5 HELIX ELECTRIC OF NEVADA, LLC, a
6 Nevada limited liability company,

7 Plaintiff,

8 v.

9
10 APCO CONSTRUCTION, a Nevada
11 corporation; SAFECO INSURANCE
12 COMPANY OF AMERICA; DOES I through
13 X; and BOE BONDING COMPANIES, I
14 through X,

15 Defendants.

Case No.: A-16-730091-C

Dept.: XI

16 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

17 This matter having come on for non-jury trial before the Honorable Elizabeth Gonzalez
18 beginning on June 3, 2019, and continuing day to day, until its completion on June 5, 2019;
19 Plaintiff, HELIX ELECTRIC OF NEVADA, LLC ("Helix"), was represented by and through its
20 counsel, Cary B. Domina, Esq. and Ronald J. Cox, Esq. of the law firm of Peel Brimley LLP, and
21 Defendants, APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF
22 AMERICA ("Safeco"), were represented by and through their counsel, Randy Jefferies, Esq. of
23 Fennemore Craig; the Court having read and considered the pleadings filed by the parties; having
24 reviewed the evidence admitted during the trial; having heard and carefully considered the
25 testimony of the witnesses called to testify; having considered the oral and written arguments of
26 counsel, and with the intent of rendering a decision on all remaining claims before the Court,

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JUL 08 2019

CLERK OF THE COURT

1 pursuant to NRCP 52(a) and 58;¹ the Court makes the following findings of fact and conclusions
2 of law:

3
4 FINDINGS OF FACT

5 1. In July 2011, APCO submitted a bid for the Craig Ranch Regional Park – Phase II
6 - Project No. 10294 (“Project”) to the City of North Las Vegas (“CNLV”). At that time, the
7 anticipated Project duration was approximately 550 calendar days.

8 2. Helix submitted a bid of approximately \$4,600,000 to APCO for the electrical
9 work required on the Project. Helix’s estimate assumed a Project duration of 550 days.

10 3. CNLV canceled the original solicitation and ultimately requested a second round
11 of bids in October 2011. Among other things, CNLV changed the duration of the Project from 18
12 months to 12 months.

13 4. On or about October 26, 2011, APCO submitted its second bid to CNLV for the
14 Project with a 12-month schedule.

15 5. CNLV issued its notice to proceed to APCO on January 11, 2012. APCO started
16 work on the Project on approximately January 16, 2012.

17 6. Helix mobilized its equipment and started work full time on or about February 20,
18 2012.

19 7. In the spring of 2012, APCO entered into a construction agreement (the “Prime
20 Contract”) with the CNLV in which APCO agreed to serve as the general contractor on the
21 Project.

22 8. Section 6.3.2 the General Conditions of the Prime Contract which are incorporated
23 into the Subcontract, states in part:

24
25
26
27 ¹ In the pretrial statement, the parties have stipulated that the Contract time was extended from January 2013
28 into November 2013 through no fault of either APCO or Helix.

1 [a]ll other claims notices for extra work shall be filed in writing to the Construction
2 Manager prior to the commencement of such work. Written notices shall use the words
3 "Notice of Potential Claim." Such Notice of Potential Claim shall state the circumstances
4 and all reasons for the claim, but need not state the amount.

5 9. After receiving the notice of proposed award, APCO agreed to contract terms with
6 Helix subject to certain specially negotiated terms modifying the form subcontract ("Helix
7 Addendum").

8 10. As part of the negotiation, APCO agreed to purchase certain materials totaling
9 \$2,248,248 as specified by Helix, which was to be removed from Helix's original proposed scope
10 and pricing.

11 11. Helix entered into an agreement with APCO to provide certain electrical related
12 labor, materials and equipment (the "Work") to the Project for the lump sum amount of
13 \$2,356,520.

14 12. On or about April 19, 2012, APCO and Helix entered into a formal subcontract for
15 the electrical work required on the Project (the "Subcontract").

16 13. Helix's Daily Reports, Certified Pay Roll Records and the Project Sign-in Sheets
17 establish that Helix started performing work for the Project as early as January 23, 2012, and
18 mobilized on the Project on or about February 28, 2012.

19 14. Pursuant to Exhibit "A" of the Subcontract, Helix was required to supply "all
20 labor, materials, tools, equipment, hoisting, forklift, supervision, management, permits and taxes
21 necessary to complete all of the scope of work" for the 'complete electrical package' for the
22 Project.
23

24 15. Section 6.5 contains a "no damage for delay" provision.

25 If Subcontractor shall be delayed in the performance of the Work by any act or neglect of
26 the Owner or Architect, or by agents or representatives of either, or by changes ordered in
27 the Work, or by fire, unavoidable casualties, national emergency, or by any cause other
28 that [SIC] the intentional Interference of Contractor, Subcontractor shall be entitled, as
Subcontractor's exclusive remedy, to an extension of time reasonably necessary to

1 compensate for the time lost due to the delay, but only if Subcontractor shall notify
2 Contractor in writing within twenty four (24) hours after such occurrences, and only if
3 Contractor shall be granted such time extension by Owner.

4 This clause was not modified by the Helix Addendum.

5 16. Section 6.7 of the Subcontract provided in pertinent part:

6 Contractor shall not be liable to Subcontractor for delays caused by reason of fire or other
7 casualty, or on account of riots, strikes, labor trouble, terrorism, acts of God, cataclysmic
8 event, or by reason of any other event or cause beyond Contractor's control, or
9 contributed to by Subcontractor.

10 Section 6.7 was not modified by the Helix Addendum.

11 17. The Parties Contract requires proof of actual cost increase. Section 7.1—which
12 was unchanged by the Helix Addendum—provides:

13 Contractor may order or direct changes, additions, deletions or other revisions in the
14 Subcontract work without invalidating the Subcontract. No changes, additions, deletions,
15 or other revisions to the Subcontract shall be valid unless made in writing. Subcontractor
16 markup shall be limited to that stated in the contract documents in addition to the
17 direct/actual on-site cost of the work, however, no profit and overhead markup on
18 overtime shall be allowed.

19 18. Section 7.2 as modified by the Helix Addendum, provided:

20 Subcontractor, prior to the commencement of such changed or revised work, shall submit,
21 (within 5 days of Contractor's written request) to Contractor, written copies of the
22 breakdown of cost or credit proposal, including work schedule revisions, for changes,
23 additions, deletions, or other revisions in a manner consistent with the Contract
24 Documents. Contractor shall not be liable to Subcontractor for a greater sum, or
25 additional time extensions, than Contractor obtains from Owner for such additional work.

26 19. The parties negotiated additional language that was included in Section 6 by the
27 Helix Addendum:

28 In the event the schedule as set forth above is changed by Contractor for whatever reason
so that Subcontractor either is precluded from performing the work in accordance with
said schedule and thereby suffers delay, or, is not allowed the number of calendar days to
perform the work under such modified schedule and must accelerate its performance, then
Subcontractor shall be entitled to receive from Contractor payment representing the costs
and damages sustained by Subcontractor for such delay or acceleration, providing said
costs and damages are first paid to Contractor.

20. Section 4.4 of the Subcontract—as amended by the Helix Addendum provides:

1 Progress payments will be made by Contractor to Subcontractor within 10 calendar days
2 after Contractor actually receives payment for Subcontractor's work from Owner. The
3 progress payment to Subcontractor shall be one hundred percent (100%) of the value of
4 Subcontract work completed (less 10% retention) during the preceding month as
5 determined by the Owner, less such other amounts as Contractor shall determine as being
6 properly withheld as allowed under this Article or as provided elsewhere in this
7 Subcontract. The estimates of Owner as to the amount of Work completed by
8 Subcontractor shall be binding upon Contractor and Subcontractor and shall conclusively
9 establish the amount of Work performed by Subcontractor. As a condition precedent to
10 receiving partial payments from Contractor for Work performed, Subcontractor shall
11 execute and deliver to Contractor, with its application for payment, a full and complete
12 release (Forms attached) of all claims and causes of action Subcontractor may have
13 against Contractor and Owner through the date of the execution of said release, save and
14 except those claims specifically listed on said release and described in a manner sufficient
15 for Contractor to identify such claim or claims with certainty. Upon the request of
16 Contractor, Subcontractor shall provide an Unconditional Waiver of Release in form
17 required by Contractor for any previous payment made to Subcontractor. Any payments
18 to Subcontractor shall be conditioned upon receipt of the actual payments by Contractor
19 from Owner. Subcontractor herein agrees to assume the same risk that the Owner may
20 become insolvent that Contractor has assumed by entering into the Prime Contract with
21 the Owner per NRS Statutes.

22 21. The Subcontract also incorporated the Prime Contract, which included the claim
23 procedures set forth in the Contract.

24 22. Helix assigned Kurk Williams as its Project Manager. Williams never signed in
25 using APCO's sign in sheets that were maintained at the Project site. By his own admission,
26 Williams' time devoted to the Project was not accurately tracked in Helix's certified payroll
27 reports, only Helix's job cost report.

28 23. Richard Clement was Helix's Project Superintendent. Clement was on site
occasionally and signed in with APCO at the Project twice during 2012.

24 24. Clement did not work on the Project between June 11, 2012 and September 26,
25 2012. Clement only worked two weeks on the Project from September 27, 2012 to October 7,
26 2012. Clement did not work on the Project from October 8, 2012 through January 20, 2013. In
27 all of 2013, which was the extended Project time, Clement only worked 32 hours during the week
28 ending January 27, 2013.

1 25. In late January 2013, Helix assigned Clement to another project and designated
2 Rainer Prietzel, Helix's Foreman to oversee work in the field, as the new Project Superintendent
3 and foreman.

4 26. According to the Labor Commissioner, and OSHA regulations, Helix must always
5 have a project superintendent on site at all times during the Project.
6

7 27. From January 2013 to May 2013, Helix typically had a three to five man crew on
8 the Project.

9 28. In early May 2013, with the exception of a few days, Prietzel was the only Helix
10 employee on the Project, and he split his time as the Project Superintendent and self-performing
11 contract and change order work on the Project.

12 29. Prietzel remained the Project Superintendent until the end of the Project in mid-
13 October 2013.
14

15 30. Helix's original line item for its general conditions, as reflected in its pay
16 application, was \$108,040 on a Subcontract price of \$2,380,085, which represents 4.5%.

17 31. The Project encountered significant delays and was not substantially completed
18 until October 25, 2013, thus resulting in Helix claiming approximately, \$138,000 in additional
19 extended overhead costs.
20

21 32. The project was never abandoned by CNLV.

22 33. Prior to the original project completion date passing, on January 9, 2013, APCO
23 submitted its first request for an extension of time to CNLV. APCO submitted its Time Impact
24 Analysis #1 ("TIA #1") to CNLV where it sought extended general conditions and home office
25 overhead of \$418,059 (\$266,229 for general conditions and \$151,830 for home office overhead).

26 34. Helix first notified APCO in writing that it would be asserting a claim for extended
27 overhead costs on January 28, 2013 and reserved its rights to submit a claim for "all additional
28

1 costs incurred due to scheduled delays for this project" (the "Claim").

2 35. As of May 9, 2013, CNLV had not made a decision on APCO's TIA #1.

3 36. On May 9, 2013, APCO submitted a revised Time Impact Analysis ("TIA #2") to
4 CNLV seeking an additional five (5) months of compensation for general conditions and home
5 office overhead, among other claims, for a total delay claim of nine (9) months.
6

7 37. As part of TIA #2, APCO submitted Change Order Request No. 39.1 to CNLV
8 seeking compensation of \$752,499 for its extended general conditions and home office overhead
9 (\$479,205 for general conditions and \$273,294 for home office overhead).

10 38. This represented approximately seventy percent (70%) of APCO's \$1,090,066.50
11 total claim against CNLV for the 9-month delay to the Project.
12

13 39. APCO's claim did not include any amounts for its subcontractors, and APCO
14 acknowledges that as a company policy, it does not include its subcontractors' claims with its
15 own claims.

16 40. Through no fault of APCO, Helix did not take delivery of various light poles and
17 related equipment until approximately January 30, 2013.

18 41. On June 19, 2013, APCO and Helix exchanged emails regarding various Project
19 issues, including Helix's delay rates. APCO confirmed that if Helix submitted a request for
20 compensation that it would be forwarded to CNLV.
21

22 42. On June 19, 2013 Helix provided a supplemental notice of claim but did not
23 provide any back up to support its daily rates or the impacts alleged to be attributed to the delay.
24 At that time, Helix still only had Prietzel working on site.

25 43. On June 21, 2013 Helix and APCO exchanged emails related to the support for
26 Helix's claimed costs, with APCO noting that a project manager was considered home office
27 overhead. Helix indicated that its job cost reports would reflect the actual costs for the extended
28

1 overhead.

2 44. In June 2013, Helix realized the Project was still several months away from being
3 completed. According to Helix's June 19 letter entitled "Extended overhead cost", Helix's cost
4 for extended overhead was \$640/day.

5 45. The \$640/day cost is comprised of (1) \$260 for the Project Manager; (2) \$280 for
6 the Superintendent; (3) \$25 for the site trailer; (4) \$5 for the Connex box; (5) \$25 for the forklift;
7 and (6) \$45 for the truck.

8 46. The email that accompanied Helix's June 19, 2013 letter advised APCO that to
9 date, Helix's Claim totaled \$72,960, but that Helix's Claim would increase for each day the
10 Project continued past the original completion date.

11 47. Also on June 19, 2013, APCO informed Helix, by way of an email, that it "is in
12 the process of presenting CNLV with a Time Impact Analysis containing facts as to why the
13 additional costs should be paid." APCO had submitted TIA #2 to CNLV on May 9, 2013, six
14 weeks prior to this email.

15 48. In the email, APCO further advised Helix that "[o]nce we fight the battle, and
16 hopefully come out successfully, this will open the door for Helix...to present their case for the
17 same."

18 49. While APCO notified Helix that it would forward to CNLV any letter Helix
19 provided regarding its claim for extended overhead costs, APCO did not inform Helix that it
20 needed Helix's Claim immediately so it could include it with APCO's claim to CNLV. Indeed,
21 according to APCO, it would first "fight that battle, and hopefully come out successfully..."
22 which would only then "open the door for Helix...to present their case..."

23 50. On August 27, 2013, despite the fact that the Project was still ongoing, Helix
24 furnished APCO with its first invoice for its Claim in the amount of \$102,400, which constituted
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1 32 weeks of extended overhead costs incurred between January 13, 2013, and August 30, 2013
2 (or 160 business days).

3 51. Helix's invoice identified an extended overhead cost of \$640/day for 32 weeks,
4 which had been provided to APCO in June 2013.

5 52. From May 6, 2013 through November 6, 2013, Prietzel was the only Helix person
6 on site. Prietzel confirmed that during that time period he was either working on completing
7 original Subcontract work for which Helix would be paid or change order work that was
8 acknowledged and paid by APCO and CNLV.

9 53. During construction, CNLV made changes or otherwise caused issues that
10 impacted Helix. In those instances, Helix submitted a request for additional compensation and
11 CNLV issued APCO change orders that compensated Helix for the related impacts. During the
12 extended Contract time, CNLV issued eleven change orders that resulted in additional
13 compensation to Helix through the Subcontract. Helix's pricing for the change orders included a
14 10% markup on materials and a 15% markup on labor to cover Helix's overhead.

15 54. APCO submitted Change Order Request No. 68 ("COR 68") to CNLV on
16 September 9, 2013, requesting compensation for Helix's Claim.

17 55. On September 16, 2013, CNLV rejected the COR 68 stating, "This COR is
18 REJECTED. The City of North Las Vegas does not have a contract with Helix Electric."

19 56. CNLV stated that it did not reject COR 68 for lack of backup or untimeliness.

20 57. The Construction Manager for CNLV during the Project, Joemel Llamado,
21 testified that the only reason he rejected Helix's Claim was because CNLV did not have a
22 contract with Helix. APCO should have included Helix's Claim in its own claim to CNLV since
23 Helix's Subcontract was with APCO, not CNLV.

24 58. Llamado did not look at the merits of the Claim because the Claim should have
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1 been included with APCO's claim.

2 59. APCO informed Helix that CNLV rejected COR 68 because of lack of backup
3 documentation.

4 60. On October 2, 2013, CNLV issued its decision on APCO's request for additional
5 time and compensation. CNLV determined that the time period from January 11, 2013 to May
6 10, 2013 was an excusable but not compensable delay. APCO was not charged liquidated
7 damages, but also was not provided compensation from January thru May 10, 2013. CNLV did
8 confirm that it would pay APCO \$560,724.16 for the delay from May 10, 2013 to October 25,
9 2013. APCO accepted that determination on or about October 10, 2013.

10 61. On October 3, 2013, APCO sent Helix a letter requesting additional back-up
11 documentation for the Claim so it could resubmit the Claim to CNLV.

12 62. That letter states in relevant part:

13 Attached is your invoice of August 27, 2013 in the amount of \$102,400. At this time
14 APCO has not received any back-up documentation to undo the previous formal rejection
15 made by the City of North Las Vegas. If you want APCO to re-submit your request,
16 please provide appropriate back-up for review.

17 63. On October 2, 2013, CNLV and APCO entered into a settlement agreement
18 through which CNLV agreed to pay APCO \$560,724.16 for its claim submitted under TIA #2,
19 including APCO's claim for added overhead and general conditions it incurred as a result of the
20 nine-month delay to the Project.

21 64. According to that settlement agreement, APCO agreed to "forgo any claims for
22 delays, disruptions, general conditions and overtime costs associated with the weekend work
23 previously performed...and for any other claim, present or future, that may occur on the project.

24 65. APCO did not notify Helix that it had entered into this settlement agreement.

25 66. Llamado's position was that the settlement agreement resolved any and all claims
26 between CNLV and APCO for the nine-month delay to the Project, including any claims APCO's
27 28

1 subcontractors might have.²

2 67. Pursuant to this settlement agreement, CNLV issued Change Order No. 50 to
3 APCO and agreed to pay APCO \$560,724.16 for the added overhead and general conditions it
4 incurred as a result of the extended project completion date.

5 68. On October 3, 2013, APCO transmitted to Helix CNLV's rejection of its invoice
6 for extended overhead.

7 69. Near the end of the Project in October 2013, Pelan, notified Helix, that Helix could
8 not include the Claim for extended overhead in Helix's pay application for retention because
9 CNLV would not release the retention on the Project if there were outstanding Claims on the
10 Project.

11 70. In compliance with Pelan's instructions, on October 18, 2013, Helix submitted its
12 Pay Application for Retention only in the amount of \$105,677.01 and identified it as Pay
13 Application No. 161113-002 (the "Retention Pay App").

14 71. On October 18, 2013, Helix submitted its pay application for the time period up
15 through October 30, 2013. At that time, Helix billed its general conditions line item at 100%.

16 72. On October 18, 2013, Helix submitted its pay application for the release of
17 retention. As with prior pay applications, Helix enclosed a conditional waiver. The release was
18 conditioned on APCO issuing a final payment in the amount of \$105,677.01 and expressly
19 confirmed that there were "zero" claims outstanding. Helix signed and provided that release to
20 APCO after receiving CNLV's rejection of its extended overhead invoice.

21 73. Helix also provided to APCO a "Conditional Waiver and Release Upon Final
22 Payment" (the "Conditional Waiver") for the Retention Pay App only (i.e. Pay App No. 161113-
23

24
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26
27 ² Joe Pelan, the Contract Manager for APCO, disagreed with this position, but APCO and Helix did not test it
28 through the claims process provided in the Prime Contract.

1 002).

2 74. Helix indicated in the Conditional Waiver that there was no "Disputed Claim
3 Amount" relating to the Retention Pay App.

4 75. Helix takes the position that the Conditional Waiver was not intended to release
5 Helix's Claim.

6 76. The evidence presented at trial of the circumstances surrounding the execution of
7 the Conditional Waiver do not support Helix's waiver of the Claim.

8 77. It took APCO more than a year to pay Helix for its Retention Pay App, during
9 which time, Helix made it clear to APCO that it would continue pursuing its Claim.

10 78. Between October 2013 and the end of October 2014 when APCO finally paid
11 Helix its retention, APCO forwarded Helix's Claim to CNLV on two separate occasions and
12 received multiple written notices from Helix that it maintained its Claim against APCO.

13 79. The project was substantially completed on October 25, 2013.

14 80. On October 31, 2013, in order to account for certain overhead items that were
15 omitted from the original Claim, Helix: (i) increased its Claim from \$102,400 to \$111,847; (ii)
16 resubmitted its Invoice to APCO; and (iii) provided additional backup information and
17 documents. Included with the revised invoice was a monthly breakdown of Helix's Claim from
18 January to August, which included the following categories of damages: (1) Project Manager; (2)
19 Project Engineer; (3) Superintendent; (4) Site trucks; (5) Project Fuel; (6) Site Trailer; (7) Wire
20 Trailer; (8) Office supplies; (9) Storage Connex boxes; (10) forklifts; (11) small tools; and (12)
21 consumables. According to the summary of the Claim, Helix charged the Project 4-hours a day
22 for its Project Manager, Kurk Williams at \$65/hour, and 4-hours a day for its Superintendent, Ray
23 Prietzel at \$70/day.

24 81. On or about November 5, 2013, three weeks after APCO received Helix's
25
26
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28

1 Retention Pay App and Conditional Waiver, APCO submitted a revised COR 68 (68.1) to CNLV
2 seeking a total of \$111,847 for Helix's Claim.

3 82. Had APCO believed Helix's Conditional Waiver for the Retention Pay App
4 (received on October 18, 2013) waived any and all claims Helix had on the Project, including its
5 Claim for extended overhead, APCO would not have submitted revised COR 68.1 to CNLV three
6 weeks after receiving Helix's Conditional Waiver.

7
8 83. On November 18, 2013, CNLV again rejected the Change Order Request stating,
9 "This is the 2nd COR for Helix Electric's extended overhead submittal. The 1st one was submitted
10 on Sept. 9, 2013 and Rejected on Sept. 16, 2013. This submittal dated Nov. 5, 2013 is
11 REJECTED on Nov. 13, 2013."

12 84. Llamado's second rejection had nothing to do with lack of backup documents or
13 untimeliness and was rejected simply because APCO should have included Helix's Claim under
14 its own claim to CNLV.

15
16 85. By this time, APCO had already settled with CNLV to receive payment for its own
17 extended overhead costs, and in doing so, waived and released any further claims against CNLV,
18 including Helix's Claim.

19 86. As Helix had previously informed APCO it would, on or about November 13,
20 2013, Helix submitted to APCO another invoice including backup in the amount of \$26,304
21 accounting for the extended overhead costs for September and October ("COR 93").

22
23 87. APCO confirmed to Helix's Kurk Williams that there would be no APCO
24 approval unless and until CNLV approved Helix's request.

25 88. CNLV rejected COR 93.

26 89. By submitting COR 93 to CNLV on November 13, 2013, APCO once again
27 acknowledged that it knew Helix's Conditional Waiver submitted on October 18, 2013 related to
28

1 the Retention Pay App only, and did not waive Helix's Claim for extended overhead.

2 90. If APCO believed the Conditional Waiver released Helix's Claim, APCO would
3 not have continued to submit Helix's Claim to CNLV.

4 91. On January 28, 2014, APCO sent Helix's Victor Fuchs and Bob Johnson an email
5 confirming that he was meeting with CNLV to discuss the remaining change order issues on
6 February 4, 2014. Pelan testified that, CNLV advised APCO that it was rejecting Helix's claim
7 because it had no merit and Helix only had one person on the Project while completing Helix's
8 contract work in 2013. Pelan reported CNLV's position to Helix.³

9 92. The Subcontract incorporated APCO's prime contract with CNLV in Section 1.1,
10 which sets forth CNLV's claims procedure for requests for payment that are escalated to claims.
11 Helix did not request that APCO initiate these proceedings on its behalf regarding the claim for
12 extended overhead.
13

14 93. On March 31, 2014, CNLV and APCO agreed that there would be no further
15 COR's submitted on the Project.
16

17 94. On April 16, 2014, Helix's Victor Fuchs threatened to convert the outstanding
18 issues into a claim if Helix's retention was not released per its pay application and release that
19 were submitted on October 18, 2013.
20

21 95. APCO admitted that on June 10, 2014, it received final retention from CNLV.

22 96. However, because APCO had not paid Helix its Retention or its Claim, Helix sent
23 APCO another demand for payment on September 26, 2014, seeking payment for both its
24 Retention and the Claim.

25 97. CNLV issued the formal notice of completion of the project on July 8, 2014.
26

27 ³ While the Court finds Pelan's testimony on this issue credible, the testimony of Llamado
28 differs.

1 98. On October 21, 2014, APCO issued check number 1473 in the amount of
2 \$105,679, which represented final payment of Helix's retention, in accordance with the October
3 18, 2013 retention billing and related final release.⁴

4 99. On October 29, 2014, APCO sent Helix an email requesting that it sign a new
5 Conditional Waiver and Release Upon Final Payment which included Helix's Retention only, but
6 did not include any disputed amount for the Claim.
7

8 100. Attached to that email was a copy of the Retention Check APCO informed Helix it
9 could pickup once it received the new executed Conditional Release.

10 101. Upon receiving the new Conditional Waiver and before picking up the Retention
11 Check, Helix notified APCO that it was not going to sign the new Conditional Waiver without
12 reserving a right to its Claim.
13

14 102. APCO invited Helix to revise the new Conditional Waiver as it saw fit, and Helix
15 provided an unsigned copy of it seeking full payment of the Claim and the Retention for a total
16 amount of \$243,830.

17 103. APCO declined to pay the Claim, and after additional discussions between Helix
18 and APCO, it was decided that Helix would exchange for the Retention Check an Unconditional
19 Waiver and Release Upon Final Payment seeking payment of \$105,679 for Retention, and
20 reserving as its Disputed Claim, \$138,151.
21

22 104. As part of the "Disputed Claim" field, Helix referenced additional correspondence
23 which it had incorporated into the Unconditional Waiver and Release.

24 105. Helix included a letter dated October 30, 2014 clarifying that while it was
25 demanding its retention payment, it was also seeking payment for its Claim in the amount of
26

27 ⁴ Because of this lengthy delay in payment, Helix is entitled to interest on the retention amount under NRS
28 338.

1 \$138,151 for which it also provided a final invoice.

2 106. In one such email, Helix writes, "Joe, please accept this email as a 30 day
3 extension of time for the execution of [the] promissory note attached...In good faith we [are]
4 extending this time per your request, so you can come up with an arrangement to repay the
5 outstanding amount that is past due."
6

7 107. APCO never executed the Promissory Note or paid Helix its Claim.

8 108. On October 29, 2014, APCO tendered the check and another signed release for
9 final payment. That release mirrored the one that Helix submitted in October 2013.

10 109. On October 29, 2014, Helix's Victor Fuchs sent an email to Pelan stating: "this is
11 not going to work." Pelan responded that same day stating: "Victor, make changes for me to
12 approve. Thanks."
13

14 110. On October 18, 2013, the Senior Vice President of Helix, Robert D. Johnson,
15 signed a "Conditional Waiver and Release Upon Final Payment".

16 111. Helix received the funds on October 29, 2014.

17 112. On October 30, 2014, the day after negotiating the final payment check, Helix
18 tendered a signed final lien release that purported to reserve Helix's extended overhead invoices
19 in the amount of \$138,151.
20

21 113. Helix has established how certain of its costs increased due to the extended time
22 on the Project given its demobilization and reduction in crew size. Prietzel was the only person
23 on site after May 6, 2013 and he was completing base Subcontract work and change order work
24 that was paid by CNLV.

25 114. After weighing the testimony of the witnesses and a review of the admitted
26 documents, the Court finds, that the delay was not so unreasonable to amount to abandonment
27
28

1 and that therefore the provision limiting damages after a delay does not permit the recovery of
2 extended general conditions.

3 115. Since CNLV determined that the delays through May 13, 2013 were not
4 compensable, the only time period that APCO recovered payment for its delay costs was May 13,
5 2013 through October 13, 2013. During that same compensable time period, Helix's reasonable
6 costs totaled \$43,992.39.⁵ Although Helix was earning revenue and being paid during the time
7 period for the Work and certain approved change orders, APCO by its settlement with CNLV,
8 impaired Helix's ability to pursue the Claim.
9

10 116. Helix has supported its claim for certain additional costs. As Prietzel was paid for
11 his time on site under the approved change orders the claimed expense for acting as a
12 superintendent (supervising only himself) is not appropriate.
13

14 117. After weighing the testimony of the witnesses and a review of the admitted
15 documents, the Court finds, Helix has established that it suffered damages as a result of the delay
16 in project completion in the amount of \$43,992.39.

17 118. If any findings of fact are properly conclusions of law, they shall be treated as if
18 appropriately identified and designated.
19

20 CONCLUSIONS OF LAW

21 1. The Subcontract was a valid contract between Helix and APCO.
22

23 ⁵ The Court has utilized the summary used as D5 during the trial with the deletion of the line item
24 "Superintendent". Those totals for the compensable months with that modification are:

May 13	\$8501.05
June 13	\$7124.90
July 13	\$8270.69
August 13	\$6785.04
September 13	\$6170.56
October 13	\$7140.15
TOTAL	\$43992.39

1 2. The Court finds that the Conditional Waiver Helix submitted to APCO on or about
2 October 2013 did not constitute a waiver of Helix's Claim.

3 3. APCO's own conduct establishes that it knew Helix was not waiving its Claim as
4 it continued to submit Helix's Claim to CNLV after receiving the Conditional Waiver.

5 4. Helix provided sufficient evidence establishing that it incurred damages as a result
6 of the Project schedule extending nine months past its original completion date.

7 5. APCO had a duty to include Helix's Claim in its own claim to CNLV or otherwise
8 preserve the Claim when it settled, which it failed to do.

9 6. APCO's internal policy and decision to keep Helix's Claim separate from its own
10 claim impaired Helix's ability to pursue the Claim.

11 7. When APCO entered into the settlement agreement with CNLV on October 3,
12 2013 without Helix's knowledge, CNLV took the position that APCO waived and released any
13 and all claims arising from the nine month Project delay, including Helix's Claim.

14 8. In every contract, there is an implied covenant of good faith and fair dealing.

15 9. APCO's impairment of Helix's Claim constitutes a breach of the covenant of good
16 faith and fair dealing implied in the Subcontract.

17 10. APCO breached the covenant of good faith and fair dealing when it, without
18 notifying Helix, settled its claim with CNLV for extended general conditions, impairing Helix
19 from pursuing any pass-through claims to CNLV for its Claim, but continued to submit Helix's
20 Claim to CNLV knowing that CNLV rejected it because it had no contractual privity with Helix,
21 and now APCO had released any and all claims against CNLV.

22 11. Helix is entitled to judgment against APCO under its claim for Breach of Implied
23 Covenant of Good Faith and Fair Dealing and its damages are the damages it has established for
24

1 in the amount of \$43,992.39.⁶

2 12. Because the Project was a public works project, it was governed under NRS
3 Chapter 338.

4 13. Under NRS 338.490, a conditional waiver and release can only release payments
5 for work which is the subject of the payment application to which the wavier and release
6 corresponds.

7
8 14. The Conditional Waiver Helix provided APCO on October 18, 2013, was for
9 retention only and expressly referred to the Retention Pay App (Pay Application No. 161113-022)
10 which sought retention only.

11 15. The Retention Pay App did not include Helix's Claim.

12 16. Therefore, because by statute, the Conditional Waiver can only release work that is
13 the subject of the Retention Pay App, it did not constitute a waiver and release of Helix's Claim.
14

15 17. NRS 338.565 states in relevant part:

16 If a contractor makes payment to a subcontractor or supplier more
17 than 10 days after the occurrence of any of the following acts or
18 omissions: (a) the contractor fails to pay his or her subcontractor or
19 supplier in accordance with the provisions of subsection 1 of NRS
20 338.550...the contractor shall pay to the subcontractor or supplier,
21 in addition to the entire amount of the progress bill or the retainage
22 bill or any portion thereof, interest from the 10th day on the amount
23 delayed, at a rate equal to the lowest daily prime rate...plus 2
24 percent, until payment is made to the subcontractor or supplier.

25 18. NRS 338.550(1) required APCO to pay Helix its retention within 10 days of
26 receiving its retention payment from CNLV.

27 ⁶ The Court has not awarded separate damages for the breach of contract claim as those would be duplicative
28 of this award.

1 19. APCO admits it received its retention payment from CNLV on June 10, 2014, yet
2 it did not pay Helix its retention until October 30, 2014, more than four months later and in
3 violation of NRS 338.550(1).

4 20. APCO was required to pay Helix its retention amount of \$105,677.01, in addition
5 to interest at the rate of prime plus 2 percent from June 10, 2014 through October 30, 2014.
6 APCO failed to do so.

7 21. After providing APCO with the Conditional Waiver, Helix incurred additional
8 damages that could not be waived by way of the Conditional Waiver (i.e. the interest on its
9 wrongfully withheld retention).

10 22. On June 10, 2014, APCO received final retention from CNLV.

11 23. APCO failed to pay Helix its retention in the amount of \$105,679 until October 29,
12 2014.

13 24. Pursuant to NRS 338.550(1), APCO was required to pay Helix its retention no
14 later than June 21, 2014.

15 25. As a result of APCO's failure, and pursuant to NRS 338.565(1), APCO is required
16 to pay Helix interest on \$105,677.01 from June 22, 2014 through October 28, 2014, at a rate of
17 5.25% for a total of \$1,960.85.

18 26. Even if the pay-if-paid clause was enforceable, APCO cannot rely upon it to shield
19 itself from liability to Helix when its decision to submit Helix's Claim separately from its claim
20 led to CNLV rejecting Helix's Claim, and APCO's settlement with CNLV forever barred APCO
21 from receiving payment from CNLV for Helix's Claim.

22 27. To the extent the delays were caused by CNLV, APCO is still liable to Helix since
23 it impaired those claims in contradiction to NRS 624.628(3)(c) by entering into a settlement
24 agreement with CNLV on October 2, 2013.

1 28. Because this Court has found APCO breached the Subcontract and breached the
2 covenant of good faith and fair dealing, Helix is entitled to judgment against Safeco and the
3 Payment Bond as well.

4 29. NRS 339.025(1)(b) provides the following:

5
6 1. Before any contract,..., exceeding \$100,000 for any project
7 for the new construction, repair or reconstruction of any public
8 building or other public work or public improvement of any
9 contracting body is awarded to any contractor, the contractor shall
furnish to the contracting body the following bonds which become
binding upon the award of the contract to the contractor;

10 a.

11 b. A payment bond in an amount to be fixed by the
12 contracting body, but not less than 50 percent of the contract
13 amount, conditioned upon the faithful performance of the
14 contract in accordance with the plans, specifications and
15 conditions of the contract. The bond must be solely for the
protection of claimants supplying labor or materials to the
contractor to whom the contract was awarded, or to any of his
or her subcontractors, in the prosecution of the work provided
for in such contract.

16 30. NRS 339.035(1) provides:

17 ...any claimant who has performed labor or furnished material in
18 the prosecution of the work provided for in any contract for which
19 a payment bond has been given pursuant to the provisions of
20 subsection 1 of NRS 339.025, and who has not been paid in full
21 before the expiration of 90 days after the date on which the
22 claimant performed the last of such labor or furnished the last of
23 such materials for which the claimant claims payment, may bring
an action on such payment bond in his or her own name to recover
any amount due the claimant for such labor or material, and may
prosecute such action to final judgment and have execution on the
judgment.

24 31. SAFECO issued a Labor and Material Payment Bond, Bond No. 024043470,
25 wherein APCO is the principal and SAFECO is the surety.

26 32. Helix provided Work to the Project and remains unpaid for the same.

27 33. Therefore, Helix is a claimant against the Bond and may execute a judgment
28

1 against the same.

2 34. Section 20.5 of the Subcontract provides that “ [i]n the event either party employs
3 an attorney to institute a lawsuit or to demand arbitration for any cause arising out of the
4 Subcontract Work or the Subcontract, or any of the Contract Documents, the prevailing party
5 shall be entitled to all costs, attorney’s fees and any other reasonable expenses incurred therein.”
6

7 35. This provision was not modified by the Helix Addendum.

8 36. The Court finds that Helix is the prevailing party and is entitled to an award of its
9 attorneys’ fees and costs.

10 37. If any conclusions of law are properly findings of fact, they shall be treated as if
11 appropriately identified and designated.

12 Based upon the foregoing Findings of Fact and Conclusions of Law **IT IS HEREBY**
13 **ORDERED, ADJUDGED AND DECREED** as follows:
14

15 1. **IT IS HEREBY ORDERED** that, as to Plaintiff’s Claim for Breach of Contract
16 against APCO, this Court finds in favor of Plaintiff but as the Claim was impaired
17 awards damages under the Breach of the Implied Covenant of Good Faith and
18 Fair Dealing, rather than awarding duplicative damages;

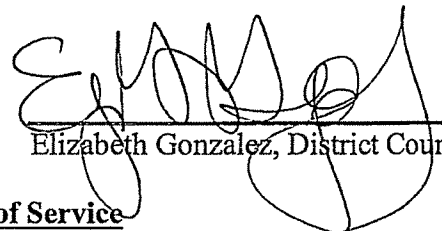
19 2. **IT IS FURTHER ORDERED** that, as to Plaintiff’s Claim for Breach of the
20 Implied Covenant of Good Faith and Fair Dealing against APCO, this Court finds
21 in favor of Plaintiff and awards damages in the amount of \$43,992.39 together
22 with interest as provided by law and taxable costs of suit;

23 3. **IT IS FURTHER ORDERED** that, as to Plaintiff’s Claim for violations of NRS
24 338 against APCO, this Court finds in favor of Plaintiff in the amount of
25 \$1,960.85;⁷
26
27

28 ⁷ These damages are in addition to those awarded under the claim of Breach of the Implied Covenant of Good

- 1 4. **IT IS FURTHER ORDERED** that, given the Court's findings against APCO,
2 the Court finds in favor of Plaintiff and against Safeco and the Bond;
3 5. **IT IS FURTHER ORDERED** that this Court will address any issues of
4 attorneys' fees through motions that may be filed with the Court.
5 6. Any claim not otherwise disposed of by this decision is dismissed.
6

7 DATED this 8th day of July, 2019.
8

9 
10 Elizabeth Gonzalez, District Court Judge
11

12 **Certificate of Service**

13 I hereby certify that on the date filed, a copy of the foregoing Scheduling Order and
14 Order Setting Civil Jury Trial, Pre-Trial and Calendar Call was electronically served, pursuant to
15 N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing
16 Program.
17

18 
19 Dan Kutinac
20
21
22
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24
25
26
27

28 Faith and Fair Dealing.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

May 17, 2017

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

May 17, 2017

8:30 AM

All Pending Motions

HEARD BY: Villani, Michael

COURTROOM: RJC Courtroom 11A

COURT CLERK: Olivia Black

RECORDER: Michelle Ramsey

REPORTER:

PARTIES

PRESENT:

Domina, Cary
Munteer, Cody S.

Attorney
Attorney

JOURNAL ENTRIES

- Arguments by counsel regarding the merits of the motion. COURT ORDERED, Decision DEFERRED. The Court will prepare a written decision.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

June 09, 2017

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

June 09, 2017

4:00 PM

Minute Order

HEARD BY: Villani, Michael

COURTROOM: Chambers

COURT CLERK: Olivia Black

RECORDER:

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- CLERK'S NOTE: A copy of this minute order was placed in the attorney folder(s) of Cary Domina, Esq. and Cody Mounter, Esq. //ob/06/09/17.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

July 26, 2017

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

**July 26, 2017 8:30 AM Motion for Partial
Summary Judgment**

HEARD BY: Villani, Michael

COURTROOM: RJC Courtroom 11A

COURT CLERK: Olivia Black

RECORDER: Cynthia Georgilas

REPORTER:

PARTIES

PRESENT: Domina, Cary Attorney
 Munteer, Cody S. Attorney

JOURNAL ENTRIES

- Arguments by counsel regarding the merits of the motion. Court stated there was a question of fact as far as the timeliness notice of extent of the submittals, the timing of the submittals, whether or not the submittals could have been supplemented in the settlement negotiation and the settlement package with the city. COURT ORDERED, Motion DENIED. Mr. Domina to prepare the Order and submit to opposing counsel as to form and content. Upon Court s inquiry, Mr. Domina advised this was a bench trial.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

November 28, 2018

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

November 28, 2018 8:30 AM Omnibus Motion in Limine

HEARD BY: Villani, Michael **COURTROOM:** RJC Courtroom 11A

COURT CLERK: Carol Donahoo

RECORDER: Michelle Ramsey

REPORTER:

PARTIES

PRESENT: Domina, Cary Attorney
 Jefferies, John R. Attorney

JOURNAL ENTRIES

- Arguments by counsel. Court does not find that there is a contract and stated there are still remaining questions; therefore, ORDERED, ruling DEFERRED as to Motions in Limine 1-2 to the time of trial. Upon Court's inquiry, Mr. Jefferies advised he has another trial going forward and has filed a Motion to Continue Trial. COURT SO NOTED. COURT FINDS this matter raises issue of fact that is better to be referred to the time of trial and ORDERED Mr. Domina to prepare the Order.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

December 04, 2018

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

December 04, 2018 3:00 PM Minute Order

HEARD BY: Villani, Michael

COURTROOM: Chambers

COURT CLERK: Haly Pannullo

RECORDER:

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- Due to the Court's schedule, COURT ORDERED, matter currently set for 01/02/19 is hereby
RESCHEDULED to 01/09/19.

CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Haly Pannullo, to
all registered parties for Odyssey File & Serve hvp/12/04/18

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

March 04, 2019

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

**March 04, 2019 9:00 AM Mandatory Rule 16
Conference**

HEARD BY: Gonzalez, Elizabeth

COURTROOM: RJC Courtroom 03E

COURT CLERK: Dulce Romea

RECORDER: Jill Hawkins

REPORTER:

PARTIES

PRESENT: Domina, Cary Attorney
 Jefferies, John R. Attorney

JOURNAL ENTRIES

- Court inquired as to how long parties will need for discovery. Mr. Domina advised this is a very unique situation as they are done with discovery; the case started two years ago and they got all the way through arbitration; there was another attorney prior to Mr. Jefferies and that attorney decided to disqualify the arbitrator; they could not select a new one, so they decided to lift the stay and bring the case back to District Court; they are done with discovery and are ready for trial. Parties declined the offer of a settlement conference.

COURT ORDERED, given the representations of counsel that discovery and designations occurred during the arbitration process, matter SET for Bench Trial on the stack beginning May 28, 2019. Trial Setting Order will ISSUE. The last day to file motions in limine and dispositive motions is April 5, 2019. Counsel advised there was one pending motion in limine which has not yet been fully briefed. COURT DIRECTED counsel to renote that motion.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

May 13, 2019

A-16-730091-B	Helix Electric of Nevada LLC, Plaintiff(s) vs. APCO Construction, Defendant(s)
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May 13, 2019 9:00 AM Motion in Limine

HEARD BY: Gonzalez, Elizabeth **COURTROOM:** RJC Courtroom 03E

COURT CLERK: Dulce Romea

RECORDER: Jill Hawkins

REPORTER:

PARTIES

PRESENT:	Domina, Cary Jefferies, John R.	Attorney Attorney
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JOURNAL ENTRIES

- APPEARANCES CONTINUED: Joe Pelan, Client Representative for Defendant.

Following arguments by counsel, COURT ORDERED, the Motions in Limine are both DENIED. While the issue related to the 30(b)(6) would be of concern the Court will treat that as a credibility issue as to the knowledge of the witness who appeared. The entire job cost report needs to be produced immediately, and if there are any issues related to the job cost report when counsel receives it, the Court will have a discussion about the timing of trial. Mr. Domina stated the job cost report will be generated this week.

5-14-19 9:30 AM CALENDAR CALL

5-28-19 1:30 PM BENCH TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

May 14, 2019

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

May 14, 2019 9:30 AM Calendar Call

HEARD BY: Gonzalez, Elizabeth **COURTROOM:** RJC Courtroom 03E

COURT CLERK: Dulce Romea

RECORDER: Jill Hawkins

REPORTER:

PARTIES

PRESENT: Domina, Cary Attorney
 Jefferies, John R. Attorney

JOURNAL ENTRIES

- Parties announced ready and anticipated trial taking 2 to 3 days. COURT ORDERED, bench trial set to COMMENCE on Monday, June 3, 2019.

6-3-19 10:30 AM BENCH TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

June 03, 2019

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

June 03, 2019

10:15 AM

Motion

HEARD BY: Gonzalez, Elizabeth

COURTROOM: RJC Courtroom 03E

COURT CLERK: Dulce Romea

RECORDER: Jill Hawkins

REPORTER:

PARTIES

PRESENT:

Domina, Cary

Attorney

Holmes, Jeremy D.

Attorney

Jefferies, John R.

Attorney

JOURNAL ENTRIES

- Following arguments by Mr. Jefferies and Mr. Holmes, COURT ORDERED, motion DENIED. While the Court understands the issues of the challenge of producing someone for a 30(b)(6), the corporation cannot be forced to provide a former employee.

6-3-19

10:30 AM

BENCH TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

June 03, 2019

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

June 03, 2019 10:30 AM Bench Trial

HEARD BY: Gonzalez, Elizabeth **COURTROOM:** RJC Courtroom 03E

COURT CLERK: Dulce Romea

RECORDER: Jill Hawkins

REPORTER:

PARTIES

PRESENT: Cox, Ronald J. Attorney
Domina, Cary Attorney
Holmes, Jeremy D. Attorney
Jefferies, John R. Attorney

JOURNAL ENTRIES

- DAY 1

APPEARANCES CONTINUED: Bob Johnson, Vice President of Helix Electric of Nevada, LLC; Joe Pelan, Client Representative for APCO Construction.

COURT ORDERED, all Proposed Joint Exhibits ADMITTED per stipulation, except for Proposed Joint Exhibit JX044 as objected to and for Proposed Joint Exhibit JX045 as not used.

Counsel advised Plaintiff's and Defendants' Proposed Exhibits are all objected to at this point.

Opening statements by Mr. Domina and Mr. Jefferies.

EXCLUSIONARY RULE INVOKED.

Testimony and exhibits presented. (See worksheet.) LUNCH RECESS.

Proceeding resumed. Testimony and exhibits presented. (See worksheet.) RECESS.

Testimony and exhibits continued. (See worksheet.)

COURT ORDERED, trial CONTINUED. EVENING RECESS.

6-3-19 9:15 AM BENCH TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

June 04, 2019

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

June 04, 2019

9:15 AM

Bench Trial

HEARD BY: Gonzalez, Elizabeth

COURTROOM: RJC Courtroom 03E

COURT CLERK: Dulce Romea

RECORDER: Jill Hawkins

REPORTER:

PARTIES

PRESENT:

Cox, Ronald J.

Attorney

Domina, Cary

Attorney

Holmes, Jeremy D.

Attorney

Jefferies, John R.

Attorney

JOURNAL ENTRIES

- DAY 2

APPEARANCES CONTINUED: Victor Fuchs, President of Helix Electric of Nevada, LLC; Robert "Bob" Johnson, Vice President of Helix Electric of Nevada, LLC; Joe Pelan, Client Representative for APCO Construction.

Testimony and exhibits presented. (See worksheet.) RECESS.

Testimony and exhibits continued. (See worksheet.) LUNCH RECESS.

Proceeding resumed. Testimony and exhibits presented. (See worksheet.) RECESS.

At the hour of 2:37 pm, Plaintiff RESTED.

Defendant's case in chief commenced. Testimony and exhibits continued. (See worksheet.)

COURT ORDERED, trial CONTINUED. EVENING RECESS.

6-4-19 9:00 AM BENCH TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

June 05, 2019

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

June 05, 2019

9:00 AM

Bench Trial

HEARD BY: Gonzalez, Elizabeth

COURTROOM: RJC Courtroom 03E

COURT CLERK: Dulce Romea

RECORDER: Patti Slattery

REPORTER:

PARTIES

PRESENT: Cox, Ronald J. Attorney
 Domina, Cary Attorney
 Holmes, Jeremy D. Attorney
 Jefferies, John R. Attorney

JOURNAL ENTRIES

- DAY 3

APPEARANCES CONTINUED: Robert "Bob" Johnson, Vice President of Helix Electric of Nevada, LLC; Joe Pelan, Client Representative for APCO Construction.

Testimony and exhibits presented. (See worksheet.) RECESS.

Testimony and exhibits continued. (See worksheet.) At the hour of 11:20 am, Defendant RESTED.

Closing arguments by Mr. Domina and Mr. Jefferies.

COURT ORDERED, matter taken UNDER ADVISEMENT and status check SET on the Court's decision.

A-16-730091-B

6-21-19

CHAMBERS

STATUS CHECK: DECISION

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

June 21, 2019

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

June 21, 2019 3:00 AM Status Check

HEARD BY: Gonzalez, Elizabeth

COURTROOM: Chambers

COURT CLERK: Dulce Romea

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- COURT ORDERED, status check CONTINUED two weeks.

CONTINUED TO : 7/5/2019 (CHAMBERS)

CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Nicole McDevitt, to all registered parties for Odyssey File & Serve. /nm 6/21/2019

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

July 05, 2019

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

July 05, 2019 3:00 AM Status Check

HEARD BY: Gonzalez, Elizabeth

COURTROOM: Chambers

COURT CLERK: Dulce Romea

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- See Findings of Fact and Conclusions of Law filed 7/8/19.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

August 19, 2019

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

August 19, 2019 9:00 AM All Pending Motions

HEARD BY: Gonzalez, Elizabeth **COURTROOM:** RJC Courtroom 03E

COURT CLERK: Dulce Romea

RECORDER: Jill Hawkins

REPORTER:

PARTIES

PRESENT: Domina, Cary Attorney
 Jefferies, John R. Attorney

JOURNAL ENTRIES

- APCO CONSTRUCTION, INC.'S AND SAFECO INSURANCE COMPANY OF AMERICA'S MOTION FOR CLARIFICATION AND/OR AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW...PLAINTIFF HELIX ELECTRIC OF NEVADA, LLC'S (I) OPPOSITION TO APCO CONSTRUCTION, INC.'S AND SAFE INSURANCE COMPANY OF AMERICA'S MOTION FOR CLARIFICATION AND/OR AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW; AND (II) COUNTERMOTION FOR AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS AF LAW

Following arguments by counsel, COURT ORDERED both motions DENIED.

9-9-19 9:00 AM HELIX ELECTRIC OF NEVADA, LLC'S MOTION FOR ATTORNEY'S FEES, COSTS, AND INTEREST

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

September 30, 2019

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

September 30, 2019 9:00 AM Motion for Attorney Fees and Costs chart re: fees to be provided

HEARD BY: Gonzalez, Elizabeth **COURTROOM:** RJC Courtroom 03E

COURT CLERK: Dulce Romea

RECORDER: Jill Hawkins

REPORTER:

PARTIES

PRESENT: Domina, Cary Attorney
 Jefferies, John R. Attorney

JOURNAL ENTRIES

- Following arguments by counsel, COURT ORDERED, \$14,927.58 in interest and \$8,949.40 in costs AWARDED. Motion CONTINUED to the chambers calendar for Friday, October 4th, for counsel for Plaintiff to PROVIDE a chart with the time keeper, rate, number of hours, and total amount billed on attorney's fees.

10-4-19 CHAMBERS HELIX ELECTRIC OF NEVADA, LLC'S MOTION FOR ATTORNEY'S FEES, COSTS, AND INTEREST

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

October 04, 2019

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

**October 04, 2019 3:00 AM Motion for Attorney Fees
and Costs**

HEARD BY: Gonzalez, Elizabeth

COURTROOM: Chambers

COURT CLERK: Dulce Romea

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Court reviewed supplement. The attorney's fees of Mr. Domina, Mr. Cox, and Ms. Hansen are AWARDED. The Court has determined that there was duplication of work among other referenced counsel as well as administrative tasks billed and has reduced the requested fee award to those timekeepers. Mr. Domina to submit an order.

CLERK'S NOTE: A copy of this minute order was distributed via Odyssey File and Serve. / dr 10-4-19

Case No.: A-16-730091-3

Trial Date: June 3, 2019 - BENCH TRIAL

Dept. No.: XI

Judge: The Honorable Judge Gonzalez

Court Clerk: DULCE ROMERA

Recorder: JILL HAWKINS ^{DAYS PATTI & DAY} _{1+2; SLATTERY 3}

Counsel for Plaintiff: Cary B. Domina, Esq. of the law

firm of Peel Brimley LLP; JEREMY HOLMES, ESQ.;
RONALD COX, ESQ.

Counsel for Defendant: John Randall Jefferies, Esq.

Of the law firm of Fennemore Craig, P.C

Plaintiff: Helix Electric of Nevada, LLC

vs.

Defendant: APCO Construction; Safeco
Insurance Company of Nevada

TRIAL BEFORE THE COURT

JOINT EXHIBITS

Exhibit Number	Bates No.(s)	Exhibit Description	Date Offered	Objection	Date Admitted
JX001	APCO000001- APCO000003	APCO Craig Ranch Regional Park - Phase II Project Change Order Log	6-3-19	NO	6-3-19
JX002	APCO000479- APCO000731	Certified Payroll Reports			
JX003	APCO000437- APCO000438	Pages 44-45 of the Prime Contract			
JX004	APCO000166- APCO000436	Daily Sign In Log			
JX005	APCO000732- APCO001068	Helix Daily Reports			
JX006	HEL000659- HEL000725	Helix Daily Reports - supplement			
JX007	HEL000450	December 20, 2011 Performance Bond			
JX008	HEL000451	December 20, 2011 Labor and Material Payment Bond			
JX009	HEL000452- HEL000453	December 20, 2011 Guarantee Bond			
JX010	APCO001269- APCO001281; APCO001335	March 15, 2012 Graybar Electric Purchase Order			
JX011	APCO000439- APCO000478	April 4, 2012 Craig Ranch Regional Park - Phase II Subcontract Agreement			
JX012	HEL000456	January 28, 2013 Letter from Kurk Williams to Brian Bohn regarding Schedule delay/Extended overhead (Bob Johnson Deposition Ex. 7)			
JX013	APCO000059- APCO000060	January 29, 2013 Email to Helix from APCO RE Schedule Delay			
JX014	HEL00531- HEL00536	April 19, 2013 Helix's Invoice No. 16113-015 in the amount of \$157,890.00 (Bob Johnson Depo Ex. 1)	6-3-19	NO	6-3-19

EXHIBIT(S) LIST

Exhibit Number	Bates No.(s)	Exhibit Description	Date Offered	Objection	Date Admitted
JX015	APCO000008- APCO000019	Correspondence from APCO to CNLV dated May 9, 2013	6-3-19	NO	6-3-19
JX016	APCO001323- APCO001328	May 20, 2013 Invoice # 161113-016 for \$157,130.00, Application and Certificate for Payment, and Conditional Waivers (Bob Johnson Deposition Ex. 2)			
JX017	HEL000461	Correspondence from Helix to APCO dated June 19, 2013 regarding Extended Overhead Costs			
JX018	APCO000040- APCO000041	June 19, 2013 APCO Email between Brian Bohn (APCO) and Kurk Williams (Helix)			
JX019	APCO000052- APCO000054	June 21, 2013 Email to Joe Pelan and Brian Bohn from Kurk Williams RE: Craig Ranch Delay Notice (Helix)			
JX020	HEL000464- HEL000467	August 27, 2013 Helix Electric Invoice to APCO RE: Extended Overhead for a Total of \$111,847.00			
JX021	APCO000106- APCO000115	September 3, 2013 COR #68 & CNLV Response and Letter from APCO to Helix requesting back-up to substantiate amount			
JX022	APCO000006- APCO000007; APCO000005	Correspondence from CNLV to APCO dated October 2, 2013			
JX023	APCO001329- APCO001333	October 18, 2013 Invoice # 161113-021 for \$129,973.50, Application and Certificate for Payment, and Conditional Waivers (Bob Johnson Deposition Ex. 4)			
JX024	APCO000066- APCO000070	October 18, 2013 Application and Certificate for Payment and Conditional Waiver and Release Upon Final Payment			
JX025	APCO000117- APCO000130	November 6, 2013 COR #68.1 & CNLV Response			
JX026	APCO000132- APCO000140	November 18, 2013 COR #93 & CNLV Response			
JX027	HEL000251- HEL000254	January 28, 2014 Email to Victor Fuchs and Bob Johnson from Joe Pelan RE: Craig Ranch - Scheduled Meeting on February 4			
JX028	APCO000038	March 17, 2014 City of Las Vegas Construction Conflict Authorization No. 00062 to APCO			
JX029	HEL000255- HEL000257	April 16, 2014 Email to Victor Fuchs from Joe Pelan RE: Craig Ranch Park - Restoration	6-3-19	NO	6-3-19

EXHIBIT(S) LIST

Exhibit Number	Bates No.(s)	Exhibit Description	Date Offered	Objection	Date Admitted
JX030	HEL000493- HEL000519	City Council Meeting Minutes (July 2, 2014)	6-3-19	NO	6-3-19
JX031	HEL000426	July 8, 2014 Proof of recordation of Notice of Completion			
JX032	HEL00537	Correspondence from Helix to APCO dated September 26, 2014 regarding Demand for Payment			
JX033	HEL00538- HEL000541	October 15, 2014 Email from Kurk Williams to Eddie Bennett FW: Craig Ranch Delay Notice (Helix)			
JX034	APCO000079- APCO000080	October 21, 2014 Check #1473 for \$105,679.00 to Helix Electric from APCO			
JX035	APCO000071- APCO000074	October 29, 2014 Email from APCO to Helix regarding Check and attachments			
JX036	APCO000075- APCO000078	October 29, 2014 Email exchange between Helix and APCO			
JX037	APCO001334	October 29, 2014 copy of posted check #1473 for \$105,679.00 to Helix Electric from APCO (Bob Johnson Deposition Ex. 10)			
JX038	HEL000382- HEL000383	October 29, 2014 Email to Victor Fuchs from Joe Pelan RE: Craig Ranch Change Approval			
JX039	HEL000427	October 29, 2014 APCO Construction Unconditional Waiver and Release Upon Final Payment			
JX040	APCO001322	Bank of Nevada to APCO Business Analysis Account with October 29, 2014 check detail			
JX041	APCO000081- APCO000082	October 30, 2014 Email from Helix to APCO with executed Unconditional			
JX042	HEL000405- HEL000407	October 30, 2014 Unconditional Waiver and Release Upon Final Payment, Letter Helix to APCO RE: 10/29/2014 Unconditional Waiver and Release Upon Final Payment, and Invoice for Extended Overhead for a Total of \$138,151.00			
JX043	HEL000490- HEL000491; HEL000489	Correspondence from Helix to APCO dated October 30, 2014 regarding Unconditional Waiver	6-3-19	NO	6-3-19
JX044	HEL000415- HEL000419	January 13, 2015 Email to Joe Pelan from Victor Fuchs RE: Promissory Note			
JX045		NOT USED			
JX046	APCO000063- APCO000064	December 18, 2015 Letter to Cary Domina from Joe Pelan RE: Craig Ranch Park - Phase II	6-3-19	NO	6-3-19

EXHIBIT(S) LIST

Exhibit Number	Bates No.(s)	Exhibit Description	Date Offered	Objection	Date Admitted
WA JX047	APCO001088- APCO001090	January 18, 2016 Email Exchange between Joe Pelan & Bob Johnson after Complaint was Filed	6-3-19	NO	6-3-19
WA JX048	APCO000141	January 18, 2016 Email to Victor Fuchs from Joe Pelan RE: Claim			
WA JX049	HEL00542- HEL00550	January 29, 2016 Email from Bob Johnson to Joe Pelan RE: Claim			
WA JX050	HEL00551- HEL00658	Complete Craig Ranch Cost Report			
WA JX051	HEL000001- HEL000205	Partial Job Costs Report/Payroll Records			
WA JX052	APCO001091- APCO001095	Helix Pay Application #11 dated December 31, 2012			
WA JX053	APCO001096- APCO001104	Helix Pay Application #12 dated January 31, 2013			
WA JX054	APCO001105- APCO001109	Helix Pay Application #13 dated February 28, 2013			
WA JX055	APCO001110- APCO001114	Helix Pay Application #14 dated March 31, 2013			
WA JX056	APCO001115- APCO001120	Helix Pay Application #15 dated April 30, 2013			
WA JX057	APCO001121- APCO001126	Helix Pay Application #16 dated May 31, 2013			
WA JX058	APCO001127- APCO001131	Helix Pay Application #17 dated June 30, 2013			
WA JX059	APCO001132- APCO001136	Helix Pay Application #18 dated July 31, 2013			
WA JX060	APCO001137- APCO001141	Helix Pay Application #19 dated August 31, 2013			
WA JX061	APCO001142- APCO001146	Helix Pay Application #20 dated September 30, 2013			
WA JX062	APCO001147- APCO001151	Helix Pay Application #21 dated October 31, 2013			
WA JX063	APCO001152- APCO001156	Helix Pay Application #22 (billing #1) dated October 31, 2013			
WA JX064	APCO001157- APCO001160	Helix Pay Application #22 (billing #2) dated October 31, 2013			
WA JX065	APCO001161- APCO001164	Helix Pay Application #22 (billing #3) dated October 31, 2013			
WA JX066	APCO001165	Helix Change Order Log			
WA JX067	APCO001166- APCO001173	APCO COR #5			
WA JX068	APCO001174- APCO001185	APCO COR #57			
WA JX069	APCO001186- APCO001201	APCO COR #58			
WA JX070	APCO001202- APCO001209	APCO COR #59	6-3-19	NO	6-3-19

EXHIBIT(S) LIST

Exhibit Number	Bates No.(s)	Exhibit Description	Date Offered	Objection	Date Admitted
JX071	APCO001210- APCO001222	APCO COR #61	6-3-19	NO	6-3-19
JX072	APCO001223- APCO001229	APCO COR #64			
JX073	APCO001230- APCO001236	APCO COR #65			
JX074	APCO001237- APCO001243	APCO COR #70			
JX075	APCO001244- APCO001251	APCO COR #71			
JX076	APCO001252- APCO001258	APCO COR #75			
JX077	APCO001259- APCO001268	APCO COR #77			
JX078	APCO000004	APCO COR #39	6-3-19	NO	6-3-19
JX079					
JX080					
PX101	HEL000490- HEL000481; HEL000477- HEL000478	December 14, 2015 Email String regarding Promissory Note (with Promissory Note attached)	6-4-19	APCO Objection: Rule 408 Court notes Rule 408 is not used in state court.	6-4-19
PX102	NA	Exhibit 20 to Joe Pelan September 8, 2017 Deposition	6-4-19	OBJ	6-4-19
PX103	APCO000163- APCO000165	CITY OF NORTH LAS VEGAS 10/1/13 PAY ESTIMATE NO. 22 from 12/1/13	6-5-19	NO	6-5-19
PX104					
PX105					
PX106					
PX107					
PX108					
PX109					
PX110					

EXHIBIT(S) LIST

Exhibit Number	Bates No.(s)	Exhibit Description	Date Offered	Objection	Date Admitted
DX201	APCO001282- APCO001293	Helix Electric Labor Costs per Certified Payroll Reports	6-4-19	Helix Objects (Demonstrative) <i>See D-4.</i>	6-4-19
DX202	APCO001294- APCO001298	Helix Electric Labor Costs per Certified Payroll Reports (February 2013- November 2013)	6-4-19	Helix Objects (Demonstrative) NONE	6-4-19
DX203	APCO001299- APCO001301	Helix Electric Certified Payroll Summary of Hours and Gross Pay & Fringe Benefits for Richard Clement and Rainer Prietzel	6-4-19	Helix Objects (Demonstrative) NONE	6-4-19
DX204	APCO001302- APCO001317	Helix Electric Sign in Log and Certified Payroll Hours (January 2012- November 2013)	6-4-19	Helix Objects (Demonstrative) NONE	6-4-19
DX205	APCO001318	Helix Billed Amounts for General Conditions vs. Comparison to Helix Partial Job Cost		Helix Objects (Demonstrative)	
DX206	APCO001336	Helix billed Amounts for General Conditions vs. Comparison to Helix Partial Job Accounting Provided in 2016 & 2019 May 2013 - October 2013		WITHDRAWN. <i>SEE D-5.</i>	
DX207	N/A	December 28, 2016 Defendants First Request for Production of Documents and Things to Helix Electric of Nevada		Helix Objects (Pleadings/ Court Documents)	
DX208	APCO000057- APCO000058	September 7, 2017 Affidavit of Joemel Llamado		Helix Objects (Affidavit no chance to cross)	
DX209	N/A	October 13, 2017 Defendants' Second Request for Production of Documents and Things to Helix Electric of Nevada, LLC		WITHDRAWN Helix Objects (Pleadings/Court Documents)	
DX210	N/A	October 22, 2018 Fourth Amended Notice of Taking NRCP Rule Deposition of Person Most Knowledgeable for Helix		Helix Objects (Pleadings/Court Documents)	
DX211	APCO001337	Helix Electric - Craig Ranch Park Phase II Payments and Release Dates	6-4-19	NO	6-4-19
DX212	APCO001338	Summary of Helix Electric Accounting Report Dated 05/23/2019		<i>See D-2.</i>	
DX213	APCO001339	November 12, 2018 Email from C. Domina to M. Bacon re Project Monthly Equip List			
DX214		"RANDY'S WORK PRODUCT" SUMMARY OF HELIX ELECTRIC ACCOUNTING REPORT DATED 3/23/19	6-5-19	NO	6-5-19
DX215					

EXHIBIT(S) LIST

Case No.: A-16-730091-B

Trial Date:

JUNE 3, 2019 - BENCH TRIAL

ept. No.: **XI**

Judge: **HON. ELIZABETH GONZALEZ**

Court Clerk: DULCE ROMEA

Plaintiff: **HELIX ELECTRIC OF NEVADA**
LLC

Recorder: JILL HAWKINS ^{DAYS PATTI}
^{1+2 ; SLATTERY} ^{DAY} 3

Counsel for Plaintiff: CARYDOMINA, ESQ.;
JEREMY HOLMES, ESQ.; RONALD COX, ESQ.

Defendant: APCO CONSTRUCTION

Counsel for Defendant: *JOHN R. JEFFRIES, ESQ.*

BENCH TRIAL

DEMONSTRATIVE EXHIBITS

[illegible]



EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE
NOTICE OF DEFICIENCY
ON APPEAL TO NEVADA SUPREME COURT

JOHN RANDALL JEFFERIES, ESQ.
300 S. FOURTH ST., SUITE 1400
LAS VEGAS, NV 89101

DATE: December 10, 2019
CASE: A-16-730091-B

RE CASE: HELIX ELECTRIC OF NEVADA, LLC vs. APCO CONSTRUCTION; SAFECO INSURANCE
COMPANY OF AMERICA

NOTICE OF APPEAL FILED: December 6, 2019

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS NOT TRANSMITTED HAVE BEEN MARKED:

- ☒ \$250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)**
 - If the \$250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.
- ☐ \$24 – District Court Filing Fee (Make Check Payable to the District Court)**
- ☒ \$500 – Cost Bond on Appeal (Make Check Payable to the District Court)**
 - NRAP 7: Bond For Costs On Appeal in Civil Cases
- ☐ Case Appeal Statement
 - NRAP 3 (a)(1), Form 2
- ☒ Order *re: Written Orders for 1, 2, 3 and 4*
- ☒ Notice of Entry of Order *re: Written Orders for 1, 2, 3 and 4*

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. The district court clerk shall apprise appellant of the deficiencies in writing, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (e) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

*****Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.***

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; BUSINESS CIVIL COVER SHEET; FINAL JUDGMENT; NOTICE OF ENTRY OF FINAL JUDGMENT; FINDINGS OF FACT AND CONCLUSIONS OF LAW; NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER; DISTRICT COURT MINUTES; EXHIBITS LIST; NOTICE OF DEFICIENCY

HELIX ELECTRIC OF NEVADA, LLC,

Plaintiff(s),

vs.

APCO CONSTRUCTION; SAFECO
INSURANCE COMPANY OF AMERICA,

Defendant(s),

Case No: A-16-730091-B

Dept No: XI

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 10 day of December 2019.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk