

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

2 APCO CONSTRUCTION, INC., A
3 NEVADA CORPORATION; AND
4 SAFECO INSURANCE COMPANY
 OF AMERICA,

5 Appellants,

6 vs.

7 HELIX ELECTRIC OF NEVADA,
8 LLC, A NEVADA LIMITED
 LIABILITY COMPANY,

9 Respondent.

Case No. 80177

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Elizabeth A. Brown
Clerk of Supreme Court

10 **APPEAL**

11 from the Eighth Judicial District Court, Clark County
12 The Honorable ELIZABETH GOFF GONZALEZ, District Judge
 District Court Case No. A-16-730091-B

13 Joint Appendix
14 Volume II

15 John Randall Jefferies, Esq. (SBN 3512)
16 Christopher H. Byrd, Esq. (SBN 1633)
 Elizabeth J. Bassett (SBN 9013)
 FENNEMORE CRAIG, P.C.
17 300 South 4th Street, 14th Floor
 Las Vegas, Nevada 89101
18 Telephone: (702) 692-8000

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

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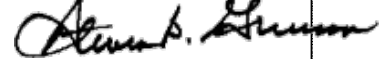
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PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

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6/9/2017 3:00 PM
Steven D. Grierson
CLERK OF THE COURT



RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
CARY B. DOMINA, ESQ.
Nevada Bar No. 10567
PEEL BRIMLEY LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Telephone: (702) 990-7272
Fax: (702) 990-7273
rpeel@peelbrimley.com
cdomina@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,

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

Plaintiff,

vs.

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

**HELIX ELECTRIC OF NEVADA,
LLC'S OPPOSITION TO APCO
CONSTRUCTION'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Defendants.

Plaintiff, HELIX ELECTRIC OF NEVADA, LLC ("Helix") by and through its attorneys, the law firm of Peel Brimley LLP, hereby submits its Opposition to Defendants APCO CONSTRUCTION'S ("APCO") and SAFECO INSURANCE COMPANY OF AMERICA'S ("Safeco") Motion for Partial Summary Judgment.

This Opposition is made and based on the following Memorandum of Points and Authorities, the pleadings, declarations and papers on file herein, and any argument that the Court entertains in this matter.

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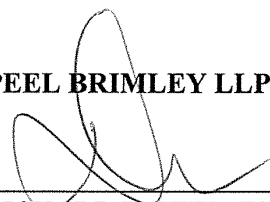
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1 Dated this 9 day of June 2017.

2 **PEEL BRIMLEY LLP**

3 

4 RICHARD L. PEEL, ESQ.

5 Nevada Bar No. 4359

6 CARY B. DOMINA, ESQ.

7 Nevada Bar No. 10567

8 3333 E. Serene Avenue, Suite 200

9 Henderson, NV 89074-6571

10 Phone: (702) 990-7272

11 *Attorneys for Helix Electric of Nevada, LLC*

12 **MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF OPPOSITION TO**
13 **MOTION FOR PARTIAL SUMMARY JUDGMENT**

14 **I. INTRODUCTION**

15 APCO's Motion for Partial Summary Judgment must be denied as genuine issues of
16 material fact exist which require this Court to make factual determinations only permissible at
17 trial. First, Helix provided APCO with timely notice of its claim for extended overhead costs (the
18 "Claim") and complied with the terms of the Subcontract in doing so. When APCO submitted its
19 claim for extended overhead costs to the City of North Las Vegas ("CNLV") it was fully aware of
20 Helix's Claim, yet it apparently failed to include Helix's Claim as part of its claim. Moreover,
21 APCO acknowledges that while it may have submitted its claim to CNLV for extended overhead
22 costs on May 9, 2013, CNLV did not actually approve the claim until October 2, 2013, four
23 months after Helix provided its Claim to APCO on June 19, 2013. Accordingly, APCO could
24 have and should have supplemented its claim to CNLV to include Helix's Claim during those
25 four months. These facts alone require the Court to weigh evidence and make factual
26 determinations which are inappropriate for a Motion for Partial Summary Judgment.

27 Second, the Nevada Supreme Court has determined that the pay-if-paid provision APCO
28 relies upon in the Subcontract is void, unenforceable and against public policy. *See Cashman
Equipment Co. v. West Edna Assoc., Ltd.*, 380 P.3d 844 (Nev. 2016) (citing *Lehrer McGovern
Bovis, Inc. v. Bullock Insulation, Inc.*, 197 P.3d 1102, 1041-42, 197 P.3d 1032 (2008)). APCO's
attempt to resurrect pay-if-paid provisions through a lengthy discussion of the Nevada Supreme

1 Court's dicta found in a footnote in the *Bullock* Case is all for naught since in 2016, the Court
2 handed down the *Cashman* Case which unequivocally holds that pay-if-paid provisions are void
3 and unenforceable in Nevada. Hence, APCO cannot defeat Helix's Breach of Contract claim by
4 claiming that the pay-if-paid provision in the Subcontract applies to this Case. Even if the Court
5 were to adopt APCO's argument that pay-if-paid provisions can be enforceable under certain
6 circumstances, and based on a case-by-case assessment, the Court would still have to deny the
7 Motion as it would (as APCO acknowledges) require the Court to evaluate and weigh the "unique
8 facts and circumstances" of this Case, which can only be performed at trial.

9 Moreover, APCO actually received payment from CNLV for extended overhead costs
10 incurred on the Project, so the pay-if-paid provision in the Subcontract **does not** apply to the facts
11 of this Case, even if it were enforceable. When APCO entered into a global settlement with
12 CNLV for its claim of extended overhead costs, APCO either (i) received payment for Helix's
13 Claim through the global settlement; or (ii) cut off any pass-through claim Helix had for its
14 extended overhead costs since Helix has no privity of contract with CNLV. Regardless, through
15 its global settlement agreement with CNLV, APCO took responsibility for ensuring that Helix
16 was paid its Claim.

17 Finally, APCO breached the covenant of good faith and fair dealing it owed to Helix when
18 in misrepresented to Helix that CNLV rejected Helix's Claim for extended overhead cost because
19 there was not sufficient backup documentation, when in fact, CNLV only rejected the Claim
20 because CNLV had no contractual privity with Helix. APCO continued to disingenuously submit
21 Helix's Claim to CNLV as a pass-through (i) knowing all along that CNLV would reject the
22 Claim for lack of contractual privity, (ii) knowing that it had settled the extended overhead claims
23 with CNLV which would preclude Helix from passing its Claim through APCO to CNLV, (iii)
24 and falsely informing Helix that the Claim was rejected for lack of backup documentation.
25 Therefore, Helix is entitled to pursue its Claim against APCO under a theory of breach of the
26 covenant of good faith and fair dealing, which also raises factual issues inappropriately decided
27 under a motion for partial summary judgment.

28 As such, APCO's Motion must be denied and this case should proceed to trial where the

1 Court will be able to weigh the facts and evidence relevant to this dispute.

2 **II. STATEMENT OF FACTS**

3 **A. GENERAL BACKGROUND OF PROJECT**

4 In the spring of 2012, APCO entered into a construction agreement with the City of North
5 Las Vegas ("CNLV") wherein APCO agreed to serve as the general contractor on the Craig
6 Ranch Regional Park Phase II project owned by CNLV ("Project").¹ On or about April 4, 2012,
7 Helix entered into an agreement with APCO ("Subcontract") wherein Helix agreed to provide
8 certain electrical related labor, materials and equipment (the "Work") to the Project for the lump
9 sum amount of \$2,356,520.00.² The Project was originally scheduled to be completed on
10 January 9, 2013.³ However, as a result of CNLV's and APCO's failures to properly prosecute
11 and manage the Project, the Project encountered significant delays and was not substantially
12 completed until October 25, 2013, thus resulting in Helix incurring approximately, \$134,000 in
13 additional extended overhead costs.⁴

14 Helix first notified APCO in writing that it would be asserting a claim for these extended
15 overhead costs on January 28, 2013 (the "Claim").⁵ Specifically, Helix emailed a letter to APCO
16 labeled "Schedule delay/Extended overhead" and stating:

17 The original scheduled final completion date was January 9,
18 2013...the current scheduled completion date that APCO
19 Construction has transmitted shows a current schedule completion
20 date of August 3, 2013. **Please accept this notice that Helix
Electric reserves all rights to any and all additional costs
incurred due to scheduled delays for this project.**⁶

21 Because Helix continued to incur damages for extended overhead costs each day the Project
22 continued passed the original completion date, Helix did not submit its formal Claim to APCO at
23

24
25 ¹ See Declaration of Victor Fuchs attached hereto at ¶ 4 (hereinafter, "Declaration").

26 ² See Exhibit "1" attached hereto, a true and correct copy of the Subcontract between Helix and APCO; *see also*,
Declaration at ¶ 5.

27 ³ See Declaration at ¶ 6.

28 ⁴ *Id.* at ¶ 7.

⁵ See Exhibit "2" attached hereto, a true and correct copy of Helix's January 28, 2013 correspondence; *see also*,
Declaration at ¶ 8.

⁶ *Id.*

1 that time.⁷ Rather, recognizing that the Project would likely continue well into the summer of
2 2013, Helix planned to submit its formal Claim once the Project was completed so its total
3 damages could be ascertained instead of “piecemealing” its damages to APCO.⁸ However, when
4 early summer rolled around and Helix realized the Project was still several months away from
5 being completed, Helix again notified APCO of its Claim by way of its June 19, 2013 letter which
6 provided a specific breakdown of the daily overhead costs Helix was incurring.⁹ In that letter
7 Helix again labeled it “Extended Overhead Cost,” and stated:

8 This letter is a follow up to our Notice letter of Schedule
9 delay/Extended overhead dated January 28, 2013. Based on the
10 original scheduled final completion date of January 9, 2013 for the
11 above referenced project **Helix Electric is incurring daily costs of
extended overhead.** Below is our daily cost associated to this
extended overhead.

<i>Project Manager</i>	<i>\$260</i>
<i>Superintendent</i>	<i>\$280</i>
<i>Site Trailer</i>	<i>\$25</i>
<i>Connex</i>	<i>\$5</i>
<i>Forklift</i>	<i>\$25</i>
<i>Truck</i>	<i>\$45</i>

16 Please be advised that **Helix will be pursuing payment for the
17 cost as the project continues to run beyond the original bid
18 documents schedule and the contract schedule.**¹⁰

19 Notably, the daily extended overhead cost Helix was incurring on the Project totaled
20 \$640/day.¹¹ As such, APCO knew at the time it received Helix’s June Notice exactly how the
21 \$640/day was broken down.¹² Unbeknownst to Helix, APCO apparently submitted its claim for
22 extended overhead costs to CNLV on May 9, 2013.¹³ However, APCO made no effort to
23 supplement its claim to CNLV to include Helix’s Claim.

24
25 ⁷ See Declaration at ¶ 9.

26 ⁸ *Id.* at Declaration at ¶ 10.

27 ⁹ See Exhibit “3” attached hereto, a true and correct copy of Helix’s June 19, 2013 correspondence; *See also*
28 Declaration at ¶ 11.

¹⁰ *Id.*

¹¹ See Declaration at ¶ 12.

¹² *Id.*

¹³ See Mot. at pg. 6:11-13.

1 On August 27, 2013, despite the fact that the Project was still ongoing, Helix furnished
2 APCO with its first invoice for its Claim in the amount of \$102,400, which constituted extended
3 overhead costs incurred between January 13, 2013 and August 30, 2013 (or 229 days).¹⁴ Notably,
4 Helix's invoice identified an extended overhead cost of \$640/day for 32 weeks, which daily cost
5 had previously been provided to APCO in June 2013.¹⁵ APCO then submitted Change Order
6 Request ("COR") No. 68 to CNLV on September 9, 2013 requesting compensation for Helix's
7 Claim.¹⁶ APCO did not include COR 68 as a supplement to its claim submitted in May despite
8 the fact that CNLV had still not made a determination as to that claim. Not surprisingly, and
9 because Helix's contractual privity was with APCO not CNLV, on September 16, 2013, CNLV
10 rejected the COR stating, "This COR is REJECTED. The City of North Las Vegas does not
11 have a contract with Helix Electric."¹⁷ Contrary to APCO's representations in the Motion and
12 to Helix during the Project, CNLV did not reject this COR for lack of backup or untimeliness.¹⁸
13 In fact, the only basis CNLV gave for rejecting the COR was that CNLV had no contractual
14 privity with Helix.¹⁹ APCO should have included Helix's Claim in its own claim to CNLV since
15 Helix's Subcontract was with APCO, not CNLV, and CNLV had not yet responded to APCO's
16 claim submitted in May. Notably, APCO acknowledges in its Motion that, "[h]ad Helix
17 submitted its claims in a timely manner—or, at the very least before the City closed the
18 project—the City would have paid for work that Helix performed for the City's benefit."²⁰ There
19 is no question that Helix submitted its Claim to APCO prior to the City closing the Project, and
20 even before CNLV approved APCO's claim, yet Helix has not been paid for its Claim.

21
22
23
24 ¹⁴ See **Exhibit "4"** attached hereto, a true and correct copy of Helix's Initial Invoice for the Claim; *see also*,
Declaration at ¶ 13.

25 ¹⁵ See Declaration at ¶ 14.

26 ¹⁶ See **Exhibit "5"** attached hereto, a true and correct copy of APCO's Change Order Request to CNLV; *see also*,
Declaration at ¶ 15.

27 ¹⁷ See **Exhibit "6"** attached hereto, a true and correct copy of CNLV's rejection of APCO's Change Order Request;
see also, Declaration at ¶ 16.

28 ¹⁸ See Declaration at ¶ 17.

¹⁹ See Declaration at ¶ 18.

²⁰ See Mot. at pg. 12, footnote 33.

1 Instead, on October 3, 2013, APCO sent Helix a letter requesting additional back-up
2 documentation for the Claim so it could resubmit the Claim to CNLV, despite the fact that CNLV
3 did not reject the Claim for lack of backup documentation.²¹ That letter states in relevant part:

4 Attached is your invoice of August 27, 2013 in the amount of
5 \$102,400. At this time **APCO has not received any back-up**
6 **documentation to undo the previous formal rejection made by**
7 **the City of North Las Vegas.** If you want APCO to re-submit
 your request, please provide appropriate back-up for review.²²

8 However, no amount of backup would have changed CNLV's mind, because it did not
9 reject Helix's Claim based on failure to provide backup documentation supporting the Claim.²³
10 Rather, it rejected Helix's Claim because Helix was APCO's subcontractor, and it was APCO's
11 responsibility to assert a claim for extended overhead costs against CNLV which amounts should
12 have included Helix's Claim.²⁴

13 On October 31, 2013, in order to account for certain overhead items that were omitted
14 from the original Claim, and because APCO misled Helix into believing CNLV rejected the
15 Claim due to insufficient documentation, Helix (i) increased its Claim; (ii) resubmitted its Invoice
16 to APCO in the amount of \$111,847; and (iii) provided additional backup information and
17 documents.²⁵ Accompanying the revised Invoice and backup documentation was a cover letter
18 wherein Helix stated:

19 Attached **please find the requested back-up documentation**
20 **requested to support our invoice...**Please note that after
21 additional review of our extended overhead for the dates of January
22 13, 2013 – August 30, 2013, we found that our calculated extended
23 overhead was actually \$111,847 and not \$102,400 that we
24 originally requested. We will be submitted a revised invoice in the
 Amount of \$111,847. **In addition we will be submitting a**
 separate invoice for extended overhead for the dates of
 September – October 25, 2013.²⁶

25 ²¹ See Exhibit "7" attached hereto, a true and correct copy of APCO's letter to Helix requesting additional
documents for the Claim; see also, Declaration at ¶ 19.

26 ²² Id.

27 ²³ See Declaration at ¶ 20.

28 ²⁴ Id. at ¶ 21.

²⁵ See Exhibit "8" attached hereto, a true and correct copy of Helix's Revised Invoice for the Claim; see also
Declaration at ¶ 22.

²⁶ Id.

1 On or about November 5, 2013, APCO submitted a revised COR (68.1) to CNLV seeking
2 a total of \$111,847 for Helix's extended overhead costs.²⁷ On November 18, 2013, CNLV again
3 rejected the Change Order Request²⁸ stating:

4 This is the 2nd COR for Helix Electric's extended overhead
5 submittal. The 1st one was submitted on Sept. 9, 2013 and Rejected
6 on Sept. 16, 2013. This submittal dated Nov. 5, 2013 is
REJECTED on Nov. 13, 2013.²⁹

7 Again, in rejecting COR 68.1, CNLV made absolutely no mention that the COR was
8 being rejected as a result of lack of backup documentation.³⁰ Instead, CNLV referenced the fact
9 that the first COR (68) had already been rejected on September 16, 2013 based on CNLV's
10 position that it had no contractual privity with Helix.³¹ Notwithstanding the foregoing, APCO
11 once again misrepresented to Helix that CNLV rejected COR 68.1 because of lack of backup
12 documentation.³² However, as discussed more fully below, little did Helix know that by this
13 time, APCO had already struck a deal with CNLV to receive payment for extended overhead
14 costs, and in doing so, waived and released any further claims against CNLV, including Helix's
15 Claim.³³ In other words, by entering into a global settlement agreement with CNLV, APCO
16 cutoff any rights Helix had to assert pass-through claims against CNLV, and in doing so, APCO
17 became responsible to ensure that Helix was paid in full for its Claim.

18 The Project was finally substantially completed on October 25, 2013.³⁴ As it had
19 previously informed APCO it would, on or about November 13, 2013, Helix submitted to APCO
20 another invoice including backup in the amount of \$26,304 accounting for the extended overhead
21 costs for September and October.³⁵ Having already settled all claims with CNLV, APCO
22 disingenuously submitted COR 93 to CNLV on November 18, 2013, knowing full well that

23 ²⁷ See **Exhibit "9"** attached hereto, a true and correct copy of APCO's COR 68.1 to CNLV; *see also*, Declaration at ¶
23.

24 ²⁸ See Declaration at ¶ 23.

25 ²⁹ See **Exhibit "10"** attached hereto, a true and correct copy of CNLV's rejection notice of COR 68.1; *see also*
26 Declaration at ¶ 24.

27 ³⁰ See Declaration at ¶ 25.

28 ³¹ *Id.* at ¶ 26.

³² *Id.* at ¶ 27.

³³ *Id.* at ¶ 28.

³⁴ *Id.* at ¶ 29.

³⁵ See **Exhibit "11"** attached hereto, a true and correct copy of Helix's Second Revised Invoice for the Claim; *see also*, Declaration at ¶ 30.

1 CNLV would reject the COR because APCO release CNLV from all claims, including Helix's
2 Claim.³⁶ Predictably, on December 4, 2013, CNLV again rejected COR 93, but made no
3 reference to lack of supporting documentation.³⁷ Rather, CNLV rejected COR 93 for the same
4 reason it had rejected all of the CORs APCO submitted on behalf of Helix—CNLV had no
5 contract with Helix and now APCO had released CNLV from all claims, including Helix's
6 Claim.³⁸

7 APCO failed to pay Helix's invoices, prompting Helix to send another demand for
8 payment on September 26, 2014.³⁹ Because APCO was holding Helix's retention payment
9 hostage as a result of Helix's Claim, Helix sent APCO another letter on October 30, 2014
10 clarifying that while it was demanding its retention payment, it was also seeking payment for its
11 Claim in the amount of \$138,151.⁴⁰ Attached to that correspondence, Helix provided APCO with
12 an Unconditional Waiver and Release Upon Final Payment which also identified \$138,151 as the
13 "Disputed Claim."⁴¹

14 The president of APCO, Joe Pelan, has always acknowledged that Helix was owed money
15 for the extended overhead costs, but Mr. Pelan informed Victor Fuchs, the president of Helix, that
16 APCO could not pay the Claim in a lump sum amount as it was facing financial difficulties.⁴²
17 Mr. Pelan also misrepresented to Helix that APCO had never been paid any portion of its
18 extended overhead costs from CNLV.⁴³ As such, Mr. Pelan agreed that if Mr. Fuchs would draft
19 up a promissory note in the amount of \$138,151, he would sign it and pay the Claim over a two-
20 year period.⁴⁴ Mr. Fuchs drafted the promissory note, but despite dozens of emails between Mr.
21 Fuchs and Mr. Pelan discussing Mr. Pelan's intention to sign it on behalf of APCO, it was never

22 ³⁶ See **Exhibit "12"** attached hereto, a true and correct copy of APCO's COR 93 to CNLV; *see also*, Declaration at ¶
23 31.

24 ³⁷ See **Exhibit "13"** attached hereto, a true and correct copy of CNLV's notice rejecting COR 93; *see also*,
25 Declaration at ¶ 32.

26 ³⁸ See Declaration at ¶ 33.

27 ³⁹ See **Exhibit "14"** attached hereto, a true and correct copy of Helix's September 26, 2014 correspondence; *see also*,
28 Declaration at ¶ 34.

⁴⁰ See **Exhibit "15"** attached hereto, a true and correct copy of Helix's October 30, 2014 correspondence; *see also*,
Declaration ¶ 35.

⁴¹ See **Exhibit "15"**; *see also*, Declaration at ¶ 36.

⁴² See Declaration at ¶ 37.

⁴³ *Id.* at ¶ 38.

⁴⁴ *Id.* at ¶ 39.

1 executed by APCO.⁴⁵ In one such email, Mr. Fuchs writes, “Joe, please accept this email as a 30
2 day extension of time for the execution of [the] promissory note attached...In good faith we [are]
3 extending this time per your request, so you can come up with an arrangement to repay the
4 outstanding amount that is past due.”⁴⁶

5 **B. DESPITE APCO’S MISREPRESENTATIONS, APCO WAS PAID BY**
6 **CNLV FOR EXTENDED OVERHEAD COSTS.**

7 On May 9, 2013, five months after APCO first learned of Helix’s Claim, and without
8 notifying Helix, APCO submitted to CNLV Change Order Request No. 39.1 in the amount of
9 \$1,090,066.50 wherein it sought compensation for the addition 9 months of extended overhead
10 costs incurred on the Project as a result of the exact same delays Helix faced.⁴⁷ On October 2,
11 2013, well after Helix submitted its Claim, CNLV issued Change Order No. 50 to APCO and
12 agreed to pay APCO \$560,724.16 for the added overhead and general conditions it incurred as a
13 result of the extended project completion date.⁴⁸ Specifically, CNLV states:

14 Given the numerous changes and multiple delays that occurred
15 during this project...the City is prepared to offer you
16 compensatory delays of 165 days from May 10, 2013 to October
17 25, 2013 for a total amount of \$560,724.16...It is understood that
18 by accepting this offer that both parties agree that the terms herein
19 are full and final acceptance by both parties...It is also
20 understood that APCO will forgo any claims for delays,
21 disruptions, general conditions and overtime costs...and for any
22 other claim, present or future, that may occur on the
23 project...Upon acceptance of this offer by APCO the City agrees
24 to allow APCO to bill the balance of the funds indicated above less
25 prior payments on its September billing for the Project.⁴⁹

26 Hence, while CNLV recognized the extended overhead costs APCO incurred on the
27 Project and paid APCO for the same, APCO (i) has refused to pay Helix for the extended
28 overhead costs it incurred during the same timeframe; and (ii) actually released CNLV from all

⁴⁵ See Exhibit “16” attached hereto, a true and correct copy of certain email exchanges between Mr. Fuchs and Mr. Palan and a draft of the Promissory Note; *see also*, Declaration at ¶ 40.

⁴⁶ *Id.* (emphasis added).

⁴⁷ See Exhibit “17” attached hereto, a true and correct copy of APCO’s COR 39.1; *see also*, Declaration at ¶ 41.

⁴⁸ See Exhibit “18” attached hereto, a true and correct copy of Change Order 50 wherein CNLV agreed to pay APCO its extended overhead costs; *see also*, Declaration at ¶ 42.

⁴⁹ *Id.*

1 future claims, to include Helix's Claim.⁵⁰ Therefore, by entering into this global settlement
2 agreement with CNLV, APCO was either (i) paid for Helix's Claim; or (ii) settled any pass-
3 through claim Helix had against CNLV. Under either scenario, APCO became responsible to
4 ensure Helix was paid its Claim.

5 Most egregiously, for the last three years (including in its Motion), APCO has dishonestly
6 claimed that it cannot pay Helix its extended overhead costs because it was never paid for
7 extended overhead from CNLV, when in fact, APCO was paid a substantial portion of its
8 extended overhead costs.⁵¹ As such, APCO's Motion for Partial Summary Judgment must be
9 denied.

10 **III. LEGAL ARGUMENTS**

11 **A. Because Genuine Issues of Material Fact Exist, Summary Judgment is**
12 **Improper.**

13 Helix provided APCO with timely notice of its Claim for extended overhead costs and
14 CNLV actually paid APCO for extended overhead costs incurred on the Project, raising genuine
15 issues of material fact such that the Court must deny APCO's Motion for Partial Summary
16 Judgment. Furthermore, the Nevada Supreme Court has determined that the pay-if-paid provision
17 APCO relies upon in the Subcontract is void, unenforceable and against public policy.

18 Summary judgment is warranted when there are "no genuine issues as to any material
19 fact" and "the moving party is entitled to judgment as a matter of law." NRCP 56(c). The
20 primary purpose of summary judgment is to determine whether there are triable issues of fact
21 requiring a formal trial on the merits. *See Woods v. Safeway*, 121 Nev. 724, 731-32, 121 P.2d
22 1026, 1031-32. A factual dispute is genuine when the evidence is such that a rational trier of fact
23 could return a verdict for the nonmoving party. *Id.* Where reasonable minds could differ on the
24 material facts at issue, summary judgment is not appropriate. *A.I. Credit Corp. v. Gohres*, 299
25 F.Supp. 2d 1156 (D.Nev. 2004). **The purpose of a summary judgment is not to deprive**
26 **litigants of their right to trial by jury if factual issues really exist.** *Caughlin Ranch*
27 *Homeowners Ass'n v. Caughlin Club*, 109 Nev. 264, 266, 849 P.2d 310, 311 (1993)(emphasis

28 ⁵⁰ See Declaration at ¶ 43.

⁵¹ *Id.* at ¶ 44.

1 added); *see also*, *Short v. Hotel Rivera, Inc.*, 79 Nev. 94, 378 P.2d 979 (1963). Rule 56 does not
2 authorize “trial by affidavits.” *Hidden Wells Ranch, Inc. v. Strip Realty, Inc.*, 83 Nev. 143. 42d
3 P.2d 599 (1967).

4 In ruling on a motion for summary judgment, the court will never weigh the evidence or
5 find the facts. *Baranski v. Fifteen Unknown Agents of Bureau of Alcohol, Tobacco and Firearms*,
6 452 F.3d 433, 451 (6th Cir. 2006), cert. denied, 127 S.Ct. 1908, 167 L.Ed. 2d. 565 (U.S. 2007).
7 Thus, the evidence of the non-moving party will be believed as true, all doubts will be construed
8 in the light most favorable to the non-moving party, and all reasonable inferences will be drawn
9 in the non-moving party’s favor. *Beard v. Banks*, 548 U.S. 521, 530-31, 126 S.Ct. 2572, 2578
10 (2006); *Hunt v. Cromartie*, 526 U.S. 541, 550-55, 119 S.Ct. 1545, 1551-52 (1999); *Eastman*
11 *Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451, 456, 112 S.Ct. 2072, 2076 (1992).
12 Further, documentary evidence must be construed in the light most favorable to the nonmoving
13 party. *Sawyer v. Sugarless Shops, Inc.*, 106 Nev. 265, 792 P.2d 14 (1990). When direct evidence
14 produced by the moving party conflicts with direct evidence produced by the opposing party, the
15 trial court must assume the truth of the evidence set forth in the opposing party’s papers with
16 respect to that fact. *Cox v. Office of Fed. Detention Tr.*, 2010 U.S. Dist. LEXIS 126316 (9th Cir.
17 2010).

18 Here, genuine issues of material fact are in dispute, such that the Court must deny
19 APCO’s Motion for Partial Summary Judgment and proceed with trial.

20 **B. Helix Provided APCO with Sufficient Notice of its Claim and Substantially**
21 **Complied with the Subcontract.**

22 APCO contends that Helix first breached the Subcontract by failing to provide timely
23 notice of its Claim, and therefore, Helix cannot enforce its Breach of Contract claims against
24 APCO. APCO is simply wrong. First, Helix did not breach the Subcontract since Helix provided
25 APCO with sufficient notice of its Claim in January 2013, just days after the Project exceeded its
26 original contract duration. Second, even if Helix did technically fail to strictly comply with the
27 terms of the Subcontract (which Helix disputes), such a deviation would not be a “material
28 breach” of contract, so APCO was not excused from performing its duties and obligations under

1 the Subcontract—paying Helix for its extended overhead and costs.

2 “Not every departure from the literal terms of a contract is sufficient to be deemed a
3 material breach of a contract requirement, thereby allowing the non-breaching party to cease its
4 performance and seek appropriate remedy. “The standard of materiality for the purposes of
5 deciding whether a contract was breached ‘is necessarily imprecise and flexible.’” *Stone Forest*
6 *Indust, Inc. v. United States*, 973 F.2d 1548, 1550-51 (Fed. Cir. 1992). Determining what is a
7 material breach of contract “depends on the nature and effect of the violation in light of how the
8 particular contract was viewed, bargained for, entered into, and performed by the parties.” *J.A.*
9 *Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277 (Nev. 2000) (citing *Stone Forest*
10 *Indust, Inc.*, 973 F.2d at 1550-51).

11 Applying the language of the Prime Contract that APCO argues should apply, it is clear
12 that Helix complied with the Notice Requirements to submit a claim under GC 6.3.2(A). That
13 provision states:

14 [I]n any case where the Contractor deems additional compensation
15 or a time extension to the Contract period is due the Contractor for
16 work or materials not covered in the Contract...**the Contractor**
17 **shall notify the Construction Manager, in writing, of its**
18 **intention to make claim**....All other claims notices for extra work
19 shall be filed in writing to the Construction Manager prior to the
20 commencement of such work. Written notice shall use the words
21 “Notice of Potential Claim.” Such Notice of Potential Claim shall
22 state the circumstances and all reasons for the claim, **but need not**
23 **state the amount**.⁵²

24 When the Project failed to end on January 9, 2013 as contemplated under the Subcontract,
25 Helix sent APCO written notice of a potential claim for extended overhead costs on January 27,
26 2013, clearly stating that it would be seeking compensation for extended overhead costs for each
27 day that the Project went over the scheduled completion date. Though this correspondence did
28 not identify the exact amount Helix would be seeking as part of its Claim, under the Subcontract,
it was not required to so long as Helix provided the circumstances and reasons for the Claim,
which it did. Therefore, APCO knew of Helix’s Claim on January 27, 2013, yet when it

⁵² See Exhibit “E” attached to APCO’s Motion.

1 submitted its claim for extended general conditions to CNLV four months later on May 9, 2013,
2 for whatever reason, it apparently failed to include Helix's Claim as part of its claim. Moreover,
3 once APCO received Helix's formal Claim in June which identified an exact dollar amount owed
4 (i.e. \$640/day), APCO still failed to include Helix's Claim with its claim to CNLV despite the
5 fact that CNLV sat on APCO's claim until October 2, 2013, four months later.

6 Helix's Notice of Claim to APCO was timely and any deviation from the requirements of
7 the Subcontract (if any) was minor and does not constitute a material breach of contract. In any
8 event, the Court would have to engage in a hotly contested factual analysis to determine whether
9 any such deviation constituted a material breach, something that the Court is prohibited from
10 doing at the summary judgment phase. As such, APCO's Motion for Partial Summary Judgment
11 must be denied.

12 **C. The Pay-if-Paid Clause in the Subcontract is Against Public Policy, Void and**
13 **Unenforceable.**

14 APCO next argues that the pay-if-paid provision in the Subcontract bars Helix from
15 forcing APCO to make payment for the Claim since APCO alleges it was never paid for its
16 extended overhead costs. First, as previously mentioned and more fully discussed below, CNLV
17 paid APCO a substantial portion of its extended overhead costs through a negotiated settlement,
18 so APCO's reliance on the pay-if-paid provision is misplaced irrespective of whether it is
19 enforceable in Nevada. In other words, since APCO was paid extended overhead costs by
20 CNLV, it cannot rely on the pay-if-paid provision of the Subcontract even if it is enforceable.
21 Second, to the extent APCO argues it was not paid for Helix's Claim, this raises factual issues
22 which must be resolved through a trial on the merits. Finally, even if APCO was not paid for
23 Helix's Claim, NRS 624.628(3)(c) states that a provision of a contract which requires a lower-
24 tiered subcontractor to waive a claim for delay damages is void and unenforceable. As such, the
25 pay-if-paid provision in the Subcontract is void and unenforceable.

26 Specifically, NRS 624.628(3)(c) states:

27 A condition, stipulation or provision in an agreement which
28 requires a lower-tiered subcontractor to waive, release or extinguish
a claim or right for damages or an extension of time that the

lower-tiered subcontractor may otherwise possess or acquire as a result of delay, acceleration, disruption or an impact event that is unreasonable under the circumstances, that was not within the contemplation of the parties at the time the agreement was entered into, or **for which the lower-tiered subcontractor is not responsible, is against public policy and is void and unenforceable.**

Here, there is no question that the Project was extended nearly a year later than the contemplated completion date set forth under the Prime Contract. These delays and disruptions were not caused by Helix and were not contemplated by the parties at the time the Subcontract was executed. To the extent the delays were caused by APCO, APCO is liable to Helix for those delays pursuant to NRS 624.628(3)(c). To the extent the delays were caused by CNLV, APCO is still liable to Helix if it failed to properly prosecute those claims or in any way impaired or waived those claims in contradiction to NRS 624.628(3)(c).

There is no question that Section 4.8 of the Subcontract is a pay-if-paid provision. That provision states in relevant part:

Subcontractor agrees that Contractor shall have no obligation to pay Subcontractor for any changed or extra work performed by Subcontractor until or **unless** Contractor has actually been paid for such work by the Progress payments...⁵³

The pay-if-paid provision in the Subcontract attempts to force Helix to waive its Claim arising from an unreasonable delay, disruption and impact event affecting the Project's schedule, and therefore is against public policy, void and unenforceable. Under NRS 624.628(3)(c), Helix cannot waive (nor can APCO limit) any of the rights afforded to it under the statute. Any contract term that purports to waive or limit Helix's rights, or relieves APCO of any obligations imposed by the statute is void and unenforceable for public policy reasons. Simply put, such a circumvention of Helix's statutory rights (and APCO's statutory obligations), even if intended by the parties as APCO suggests, is expressly forbidden by NRS 624.628(3). The fact that Helix did not strike the pay-if-paid clause from the Subcontract and attempted to negotiate and clarify language in a pay-if-paid clause, does not mean the parties can agree to make an illegal provision legal. *See Magill v. Lewis*, 74 Nev. 381, 333 P.2d 717 (1958)(holding, "[t]he rule that the courts

⁵³ See Section 4.8 of Exhibit "1".

1 will not lend their aid to the enforcement of an illegal agreement [or provision] or one against
2 public policy is fundamentally sound”). Furthermore, in negotiating the language of the
3 Subcontract, Helix specifically included the words “per NRS Statutes” after the pay-if-paid
4 clause, acknowledging that the pay-if-paid clause must conform to Nevada law. Hence, because
5 Nevada law makes pay-if-paid provisions unenforceable in Nevada, Helix could not have agreed
6 to this provision.

7 APCO next argues that the Nevada Supreme Court has authorized the use of pay-if-paid
8 clauses in some instances and that courts should undertake a “case-by-case assessment” to
9 determine whether such provisions are applicable.⁵⁴ In arguing that the pay-if-paid provision is
10 applicable, APCO states, “it is best to consider the pay-if-paid clause under the unique facts and
11 circumstances of this case.” Hence, adopting APCO’s argument would still require the Court to
12 make factual determinations which it cannot do under the motion for partial summary judgment
13 standard. Rather, the only way the Court could find that the pay-if-paid clause were applicable to
14 this Case is to make this determination at trial, after all the “unique facts and circumstances of
15 this case”⁵⁵ are litigated.

16 Finally, while there may be some instances when a pay-if-paid provision could be
17 enforceable, none of those exceptions articulated by the Nevada Supreme Court apply in this
18 case. Under NRS 624.628, a lower-tiered subcontractor (such as Helix) can only waive its
19 payment rights in one of the following ways, (i) giving a waiver and release in the form, time and
20 manner provided for in NRS 108.2457(5), (ii) giving a two-party joint check⁵⁶, or (iii) having
21 entered into an accord and satisfaction in settlement of the action pending in a court or
22 arbitration.⁵⁷ Here, Helix has not given such waiver and release, received and negotiated any
23 joint checks, or entered into an accord and satisfaction with respect to the amounts that are the
24 subject of this Litigation. In fact, APCO paid Helix its retention even though Helix submitted an
25 unconditional waiver and release which specifically identified its Claim of \$134,000 as a

26 ⁵⁴ See Mot. at pg. 16:12-17.

27 ⁵⁵ *Id.*

28 ⁵⁶ See NRS 108.2457(3)—but such waiver or release is limited to the amount of the check, the amount the payor
intended to pay to the subcontractor, or the balance owed to the subcontractor, whichever is less)

⁵⁷ See NRS 108.2457(4)

1 “disputed amount” still outstanding and not resolved by the payment or the waiver and release.
2 As such, Helix has not waived or released its statutory payment rights, so the limited exceptions
3 to when a pay-if-paid clause could be enforceable under the *Bullock* case, simply do not exist in
4 this Case.

5 Furthermore, there is no question that Helix is not responsible for the delays to the Project
6 which resulted in the Project taking nearly a year longer than set forth in the Prime Contract and
7 the bid documents. As such, any provision in the Subcontract which requires Helix to waive its
8 right to assert a claim for damages resulting from this delay, including the pay-if-paid provision,
9 is void and unenforceable in Nevada as a matter of law. Moreover, there are material facts that
10 preclude summary judgment relating to the delays. If the delays were caused by APCO, APCO is
11 liable for the delay damages it caused. If the delays were caused by CNLV, APCO had a
12 contractual responsibility to properly pursue those claims on behalf of Helix. There are material
13 facts as to whether APCO properly pursued Helix’s Claim, whether the global settlement entered
14 into between APCO and CNLV covered the delay damages sought by Helix, or whether APCO
15 waived its right to be able to pursue Helix’s Claim.

16 In addition, language in the Subcontract itself expresses an intention to be in harmony
17 with Nevada law, and to the extent any portion of the Subcontract conflicts with existing law, that
18 provision shall be deemed inoperative. Specifically, Section 20.3 of the Subcontract states in
19 relevant part:

20 [I]f any provision of this Subcontract shall conflict with any such
21 law, ruling or regulation, then such provision shall continue in
22 effect **to the extent permissible**. The illegality of any provisions,
or parts thereof, shall not affect the enforceability of any other
provisions of this Subcontract.⁵⁸

23 Accordingly, both under the language of the statute and the Subcontract, APCO’s reliance
24 on the pay-if-paid clause fails.

25 The Nevada Supreme Court has also found that conditions, provisions and stipulations in
26 contracts that attempt to limit or prospectively waive and/or release *payment rights*, or circumvent
27 the Statutes, are void and unenforceable. In *Hardy Companies, Inc. v. SNMark, LLC*, 245 P.3rd
28

⁵⁸ See Section 20.3 of “Exhibit “1”

1 1149, 1156 (Nev. 2010), the Nevada Supreme Court confirmed that “conditions, stipulations or
2 provisions in a contract that require a [subcontractor] to waive [payment rights]” are void.
3 Furthermore, in *Bullock*, the Court held that prospective waivers and releases of *payment rights* are
4 statutorily unenforceable because they fail to ensure payment to subcontractors. 197 P.3d at 1041-42.

5 In *Bullock*,⁵⁹ the Nevada Supreme Court declared pay-if-paid clauses “void and
6 unenforceable” as against Nevada’s public policy favoring a subcontractor’s *payment rights*. See
7 *Bullock*, 197 P.3d at 1032. Specifically, but without limitation, *Bullock* held as follows:

- 8 • “We conclude that the district court properly determined that the lien
9 waiver and pay-if-paid provisions were unenforceable based upon
10 Nevada’s public policy favoring the statutory right to a mechanic’s
11 lien.” 197 P.3d at 1035.
- 12 • “Because a pay-if-paid provision limits a subcontractor’s ability to be
13 paid for work already performed, such a provision impairs the
14 subcontractor’s statutory right ...Therefore, we conclude that pay-if-
15 paid provisions are unenforceable because they violate public
16 policy.” 197 P.3d at 1042.
- 17 • “Regarding the pay-if-paid provision, we conclude that the district
18 court properly struck down the pay-if-paid provision as unenforceable
19 based upon public policy.” 197 P.3d 1044.

20 APCO dedicates five pages of its Motion to a scholarly discussion regarding the two
21 *Bullock* decisions and the confusion encountered by the Nevada Supreme Court’s inclusion of
22 dicta in a footnote. However, such an exercise is unnecessary because in November 2016, the
23 Nevada Supreme Court affirmed its holding in *Bullock* that pay-if-paid provisions are against
24 public policy, void and unenforceable.

25 Specifically, in the *Cashman* Case, the Nevada Supreme Court held:

26 We have not yet specifically decided whether an unconditional
27 release can be used to waive the statutory rights in NRS
28 108.2457(e), but our reasoning in *Lehrer* [*Bullock*], where we
determined that a pay-if-paid provision in a contract was
unenforceable because such provisions “violate public policy”
applies here. At the time the *Lehrer* parties entered into the
contract containing the pay-if-paid provision, the Legislature
had not yet made such provisions unenforceable. Nonetheless,
we concluded that pay-if-paid provisions could preclude a

⁵⁹ In its Motion, APCO refers to the *Bullock* case as the “*Lehrer*” case.

1 subcontractor from being “paid for work already performed.”

2 *See Cashman Equip. Co.*, 380 P.3d at 848 (citations omitted).

3 As such, the Nevada Supreme Court has unequivocally declared pay-if-paid provisions—
4 like the one in the Subcontract—to be void and unenforceable, and no further discussion of the
5 *Bullock* case is necessary. Simply put, the Court got it right in *Cashman* and made it very clear
6 that pay-if-paid clauses are unenforceable in Nevada. Therefore, APCO cannot rely on the pay-if-
7 paid provision of the Subcontract as the basis of its failure to pay Helix’s Claim.

8 **D. The Pay-if-Paid Clause in the Subcontract is Irrelevant Because APCO was**
9 **Paid by CNLV for Extended Overhead Costs.**

10 Even if the Court were to find that the pay-if-paid provision in the Subcontract was
11 enforceable (which under *Cashman*, it is not), the fact remains that APCO was paid by CNLV for
12 a substantial portion of its extended overhead costs, which includes or should have included
13 Helix’s Claim since Helix’s Subcontract was with APCO, not CNLV.

14 At the time APCO submitted its Claim to CNLV for extended overhead costs,⁶⁰ APCO
15 absolutely knew that Helix had asserted its Claim for extended overhead costs and would be
16 continuing to incur costs through the end of the Project. Without notifying Helix that it was
17 submitting a claim for extended overhead costs in May of 2013, APCO submitted its claim to
18 CNLV and negotiated a global settlement agreement whereby CNLV would pay APCO
19 \$560,724.16, in exchange for a waiver and release of any and all claims APCO (or any of its
20 subcontractors) had or may have against CNLV, including Helix’s Claim. Thus, at the time
21 APCO entered into the global settlement with CNLV for extended overhead costs in October
22 2013, APCO knew of Helix’s Claim and had received several invoices and backup documents
23 substantiating the Claim. Therefore, pursuant to the global settlement agreement, (i) CNLV
24 either paid APCO for Helix’s Claim; or (ii) APCO waived and released any pass-through claim
25 Helix had against CNLV, and took responsibility to ensure that CNLV was paid in full.
26 Regardless of which event occurred, APCO is now responsible to pay Helix’s Claim.

27 Therefore, because APCO was paid by CNLV for extended overhead costs and because
28 APCO waived Helix’s Claim by accepting the global settlement amount, APCO is estopped from

⁶⁰ APCO uses the term “extended general conditions” in its claim to CNLV.

1 arguing that the pay-if-paid clause applies, and must be required to pay Helix's Claim.

2 **E. APCO Breached the Covenant of Good Faith and Fair Dealing Owed to Helix**
3 **When it Misrepresented the Reasons Why CNLV Rejected Helix's Claim.**

4 APCO's Motion must also be denied because APCO breached the covenant of good faith
5 and fair dealing owed to Helix when it repeatedly misrepresented the reasons why CNLV rejected
6 Helix's Claim.

7 APCO repeatedly misrepresented to Helix that CNLV rejected its Claim as a result of
8 insufficient backup documentation. However, CNLV never once rejected the Claim for
9 insufficient backup; rather, CNLV repeatedly rejected the Claim based on lack of contractual
10 privity with Helix. APCO knew this, yet misled Helix so it could avoid having to pay Helix's
11 Claim. APCO had a duty to deal fairly and honestly with Helix in submitting its Claim to CNLV.
12 Instead of telling Helix the truth as to why CNLV rejected the Claim, or instead of simply
13 submitting Helix's Claim with APCO's claim, APCO continued submitting Helix's Claim to
14 CNLV independently—knowing each time that CNLV would reject the Claim for lack of
15 contractual privity. Had APCO been honest with Helix by telling it the real reason why CNLV
16 rejected the Claim, APCO could have included Helix's Claim in APCO's claim for extended
17 overhead costs. Instead, Helix relied on APCO's misrepresentations and continued resubmitting
18 backup documents in a futile effort to convince CNLV to approve the Claim, when CNLV was
19 never going to approve the Claim since Helix was not its subcontractor and APCO had already
20 released CNLV from all claims, including Helix's Claim. Again, APCO acknowledges in its
21 Motion that, CNLV would have paid its Helix's Claim had Helix submitted its Claim before
22 CNLV closed the project.⁶¹ There is no question that Helix submitted its Claim before CNLV
23 closed the Project and certainly before APCO cut-off Helix's rights to assert a pass-through claim
24 against CNLV by entering into the global settlement agreement.

25 Accordingly, genuine issues of material fact exist as to whether APCO breached its duty
26 of good faith and fair dealing owed to Helix, which would also provide Helix with an avenue to
27 recover its Claim from APCO and Safeco.

28 ⁶¹ See Mot. at pg. 12, footnote 33.

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

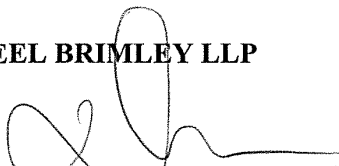
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IV. CONCLUSION

Based on the foregoing, this Court should (i) find that genuine issues of material fact exist which can only be resolved at trial; and (ii) deny the Motion.

Dated this 9 day of June 2017.

PEEL BRIMLEY LLP

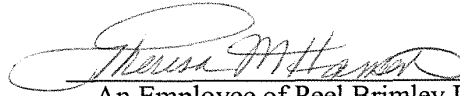


RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
CARY DOMINA, ESQ.
Nevada Bar No. 10567
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Attorneys for Helix Electric of Nevada, LLC

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 9th day of June, 2017, I caused the above and foregoing document entitled **HELIX ELECTRIC OF NEVADA, LLC'S OPPOSITION TO APCO CONSTRUCTION'S MOTION FOR PARTIAL SUMMARY 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
- ☐ emailed to all interested parties.



An Employee of Peel Brimley LLP

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

1 RICHARD L. PEEL ESQ.
Nevada Bar No. 4359
2 CARY B. DOMINA, ESQ.
Nevada Bar No. 10567
3 **PEEL BRIMLEY LLP**
3333 E. Serene Avenue, Suite 200
4 Henderson, Nevada 89074-6571
Telephone: (702) 990-7272
5 Fax: (702) 990-7273
rpeel@peelbrimley.com
6 cdomina@peelbrimley.com
Attorneys for Plaintiff Helix Electric of Nevada, LLC

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 HELIX ELECTRIC OF NEVADA, LLC, a CASE NO.: A-16-730091-C
Nevada limited liability company, DEPT. NO.: XVII

11 Plaintiff,

12 vs.

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

15 Defendants.
16

**DECLARATION OF VICTOR
FUCHS IN SUPPORT OF HELIX
ELECTRIC OF NEVADA, LLC'S
OPPOSITION TO APCO
CONSTRUCTION'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

17 I, Victor Fuchs, hereby declare under penalty of perjury under the laws of the State of
18 Nevada that the following is true and correct:

19 1. I have personal knowledge of the facts stated herein, except as stated upon
20 information and belief, and as to those matters, I believe them to be true, and I am competent to
21 testify to their truthfulness if called upon to do so.

22 2. I am the owner of HELIX ELECTRIC OF NEVADA, LLC ("Helix").

23 3. I make this Declaration in support of Helix's Opposition ("Opposition") to
24 Defendants APCO CONSTRUCTION'S ("APCO") and SAFECO INSURANCE COMPANY
25 OF AMERICA'S ("Safeco") Motion for Partial Summary Judgment.

26 4. In the spring of 2012, APCO entered into a construction agreement with the City
27 of North Las Vegas ("CNLV") wherein APCO agreed to serve as the general contractor on the
28 Craig Ranch Regional Park Phase II project owned by CNLV ("Project").

1 5. On or about April 4, 2012, Helix entered into an agreement with APCO
2 ("Subcontract") wherein Helix agreed to provide certain electrical related labor, materials and
3 equipment (the "Work") to the Project for the lump sum amount of \$2,356,520.00. **Exhibit "1"**
4 attached to the Opposition is a true and correct copy of the Subcontract between Helix and
5 APCO.

6 6. The Project was originally scheduled to be completed on January 9, 2013.

7 7. However, as a result of CNLV's and APCO's failures to properly manage the
8 Project, the Project encountered significant delays and was not substantially completed until
9 October 25, 2013, thus resulting in Helix incurring approximately, \$134,000 in additional
10 extended overhead costs.

11 8. Helix first notified APCO in writing that it would be asserting a claim for these
12 cost overruns on January 28, 2013 (the "Claim"). **Exhibit "2"** attached to the Opposition is a true
13 and correct copy of Helix's January 28, 2013 correspondence.

14 9. Because Helix continued to incur damages for extended overhead costs each day
15 the Project continued passed the original completion date, Helix did not submit its formal Claim
16 to APCO at that time.

17 10. Rather, recognizing that the Project would likely continue well into the summer of
18 2013, Helix planned to submit its formal Claim once the Project was completed so its total
19 damages could be ascertained.

20 11. However, when early summer rolled around and Helix realized the Project was
21 still several months from being completed, Helix again notified APCO of its Claim by way of its
22 June 19, 2013 letter which provided a specific breakdown of the daily overhead costs Helix was
23 incurring. **Exhibit "3"** attached to the Opposition is a true and correct copy of Helix's June 19,
24 2013 correspondence.

25 12. The daily extended overhead cost Helix was incurring on the Project totaled
26 \$640/day and APCO knew at the time it received Helix's June Notice letter exactly how the
27 \$640/day was broken down.

28 13. On August 27, 2013, Helix furnished APCO with its first invoice for its Claim in

1 the amount of \$102,400, which constituted extended overhead costs incurred between January 13,
2 2013 and August 30, 2013 (or 229 days). **Exhibit "4"** attached to the Opposition is a true and
3 correct copy of Helix's Initial Invoice for the Claim.

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

6 15. Upon information and belief, APCO submitted Change Order Request ("COR")
7 No. 68 to CNLV on September 9, 2013 requesting compensation for Helix's Claim. **Exhibit "5"**
8 attached to the Opposition is a true and correct copy of APCO's Change Order Request to CNLV.

9 16. Not surprisingly, and because Helix's contractual privity was with APCO not
10 CNLV, on September 16, 2013, CNLV rejected the COR stating, "This COR is REJECTED. The
11 City of North Las Vegas does not have a contract with Helix Electric." **Exhibit "6"** attached
12 to the Opposition is a true and correct copy of CNLV's rejection of APCO's Change Order
13 Request.

14 17. Contrary to APCO's representations in the Motion and to Helix during the Project,
15 CNLV **did not** reject this COR for lack of backup or untimeliness.

16 18. The only basis CNLV gave for rejecting the COR was that CNLV had no
17 contractual privity with Helix.

18 19. On October 3, 2013, APCO sent Helix a letter requesting additional back-up
19 documentation for the Claim so it could resubmit the Claim to CNLV, despite the fact that CNLV
20 did not reject the Claim for lack of backup documentation. **Exhibit "7"** attached to the
21 Opposition is a true and correct copy of APCO's letter to Helix requesting additional documents
22 for the Claim.

23 20. However, no amount of backup would have changed CNLV's mind, because it did
24 not reject Helix's Claim based on failure to provide backup documentation supporting the Claim.

25 21. Rather, it rejected Helix's Claim because Helix was APCO's subcontractor, and it
26 was APCO's responsibility to assert its own claim for extended overhead costs against CNLV
27 which amounts should have included Helix's (its subcontractor) Claim.

28 22. On October 31, 2013, in order to account for certain overhead items that were

1 omitted from the original Claim, and because APCO misled Helix into believing CNLV rejected
2 the Claim due to insufficient documentation, Helix (i) increased its Claim; (ii) resubmitted its
3 Invoice to APCO in the amount of \$111,847; and provided additional backup information and
4 documents. **Exhibit "8"** attached to the Opposition is a true and correct copy of Helix's Revised
5 Invoice for the Claim.

6 23. Upon information and belief, on or about November 5, 2013, APCO submitted a
7 revised COR (68.1) to CNLV seeking a total of \$111,847 for Helix's extended overhead costs.
8 **Exhibit "9"** attached to the Opposition is a true and correct copy of APCO's COR 68.1 to
9 CNLV.

10 24. Upon information and belief, on November 18, 2013, CNLV again rejected the
11 Change Order Request. **Exhibit "10"** attached to the Opposition is a true and correct copy of
12 CNLV's rejection notice of COR 68.1.

13 25. Again, in rejecting COR 68.1, CNLV made absolutely no mention that the COR
14 was being rejected as a result of lack of backup documentation.

15 26. Instead, CNLV referenced the fact that the first COR (68) had already been
16 rejected on September 16, 2013 based on CNLV's position that it had no contractual privity with
17 Helix.

18 27. Notwithstanding the foregoing, APCO once again misrepresented to Helix that
19 CNLV rejected COR 68.1 because of lack of backup documentation.

20 28. Little did Helix know that by this time, APCO had already struck a deal with
21 CNLV to receive payment for its extended overhead costs, and in doing so, waived and released
22 any further claims against CNLV, including Helix's Claim.

23 29. The Project was finally substantially completed on October 25, 2013.

24 30. As it had previously informed APCO it would, on or about November 13, 2013,
25 Helix submitted to APCO another invoice including backup in the amount of \$26,304 accounting
26 for the extended overhead costs for September and October. **Exhibit "11"** attached to the
27 Opposition is a true and correct copy of Helix's Second Revised Invoice for the Claim.

28 31. Having already settled all claims with CNLV, upon information and belief, APCO

1 disingenuously submitted COR 93 to CNLV on November 18, 2013, knowing full well that
2 CNLV would reject the COR. **Exhibit "12"** attached to the Opposition is a true and correct copy
3 of APCO's COR 93 to CNLV.

4 32. Predictably, on December 4, 2013, CNLV again rejected COR 93, but made no
5 reference to lack of supporting documentation. **Exhibit "13"** attached to the Opposition is a true
6 and correct copy of CNLV's notice to APCO rejectin COR 93.

7 33. Rather, CNLV rejected COR 93 for the same reason it had rejected all of the
8 CORs APCO submitted on behalf of Helix—CNLV had no contract with Helix.

9 34. APCO failed to pay Helix's invoices, prompting Helix to send another demand for
10 payment on September 26, 2014. **Exhibit "14"** attached to the Opposition is a true and correct
11 copy of Helix's September 26, 2014 correspondence.

12 35. Because APCO was holding Helix's retention payment hostage as a result of
13 Helix's Claim, Helix sent APCO another letter on October 30, 2014 clarifying that while it was
14 demanding its retention payment, it was also seeking payment for its Claim in the amount of
15 \$138,151. **Exhibit "15"** attached to the Opposition is a true and correct copy of Helix's October
16 30, 2014 correspondence.

17 36. Attached to that correspondence, Helix provided APCO with an Unconditional
18 Waiver and Release Upon Final Payment which also identified \$138,151 as the "Disputed
19 Claim."

20 37. The president of APCO, Joe Pelan, has always acknowledged that Helix was owed
21 money for the extended overhead costs, but Mr. Pelan informed me that APCO could not pay the
22 Claim in a lump sum amount as it was facing financial difficulties.

23 38. Mr. Pelan also misrepresented to me that APCO had never been paid its extended
24 overhead costs from CNLV.

25 39. As such, Mr. Pelan agreed that if I would draft up a promissory note in the amount
26 of \$138,151, he would sign it and pay the Claim over a two-year period.

27 40. Therefore, I caused to be drafted the promissory note, but despite dozens of emails
28 between me and Mr. Pelan discussing Mr. Pelan's intention to sign it on behalf of APCO, it was

1 never executed by APCO. **Exhibit "16"** attached to the Opposition is a true and correct copy of
2 certain email exchanges between me and Mr. Palen and a draft of the Promissory Note.

3 41. Upon information and belief, on May 9, 2013, five months after APCO first
4 learned of Helix's Claim, and without notifying Helix, APCO submitted to CNLV Change Order
5 Request No. 39.1 in the amount of \$1,090,066.50 wherein it sought compensation for the addition
6 9 months of extended overhead costs it incurred on the Project as a result of the exact same delays
7 Helix faced. **Exhibit "17"** attached to the Opposition is a true and correct copy APCO's COR
8 39.1.

9 42. Upon information and belief, on October 2, 2013, well after Helix submitted its
10 Claim (and revisions thereto), CNLV issued Change Order No. 50 to APCO and agreed to pay
11 APCO \$560,724.16 for the added overhead and general conditions it incurred as a result of the
12 extended project completion date. **Exhibit "18"** attached to the Opposition is a true and correct
13 copy Change Order 50 wherein CNLV agreed to pay APCO \$560,724.16.

14 43. Therefore, while CNLV recognized the extended overhead costs APCO incurred
15 on the Project and paid APCO for the same, APCO has refused to pay Helix for the extended
16 overhead costs it incurred during the same timeframe and actually waived any right to seek
17 Helix's Claim from CNLV.

18 44. Most egregiously, for the last three years (including in its Motion), APCO has
19 dishonestly claimed that it cannot pay Helix its extended overhead costs because it was never paid
20 for extended overhead from the CNLV, when in fact, APCO was paid for its extended overhead
21 costs.

22 I declare under penalty of perjury that the foregoing is true and correct.

23 DATED this 17 day of January 2017.

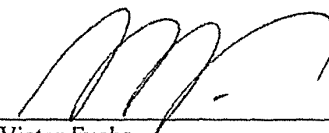
24 
25 Victor Fuchs
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27
28

EXHIBIT “1”

SUBCONTRACT AGREEMENT

APCO CONSTRUCTION - CONTRACT No: 193-6 Cost Code: _____ CONTRACT Amount: \$ 2,380,085.20

PROJECT NO.: PWP# CL-2012-31 / Project No. 1398
DISCRIPTION: Craig Ranch Regional Park - Phase II
828 West Craig Road, NLV, NV 89032

OWNER: City of North Las Vegas
2250 Las Vegas Blvd. North
North Las Vegas, Nevada 89030

The above term 'Owner' as referenced in this subcontract agreement document shall mean the above entity or agent of the Owners as authorized representative.

ARCHITECT/ENGINEER:

Architect: SH Architecture - 7373 Peak Drive., Ste. 250, Las Vegas, NV 89128 (Tel.) 363-2222 (Fax) 363-6060; Mech.: MSA Engineering Consultants - 370 E. Windmill Lane Ste. 100, Las Vegas, NV 89123 (Tel.) 896-1100 (Fax) 896-1133; Structural Engineer: Mendenhall Smith - 3571 Red Rock Street, Ste. A, Las Vegas, NV 89103, (Tel.) 367-0725 (Fax) 367-2727; Civil / Landscape: Cardno WRG - 10649 Jeffreys St., Henderson, NV 89052 (Tel.) 990-9300 (Fax) 990-9305

THIS AGREEMENT is entered into in consideration of the commitments made the 28th day of October, 2011, between:

GENERAL CONTRACTOR

AND

SUBCONTRACTOR

APCO Construction
3840 North Commerce St.
North Las Vegas, NV 89032
P - (702) 734-0188 F - (702) 734-0396
License No. 0014663
Limit: Unlimited

Helix Electric
3070 E. Sunset Rd., Ste. 0
Las Vegas, NV 89120
P - (702) 732-1188 F - (702) 732-4386
License No. 0053810
Limit: Unlimited

Contractor and Subcontractor agree as follows:

1. Contract Documents

1.1 The Contract Documents for this Subcontract Agreement, shall include all exhibits and other documents attached hereto or made a part thereof by reference, all drawings and specifications as designed by Architect: SH Architecture - 7373 Peak Drive., Ste. 250, Las Vegas, NV 89128 (Tel.) 363-2222 (Fax) 363-6060; Mech.: MSA Engineering Consultants - 370 E. Windmill Lane Ste. 100, Las Vegas, NV 89123 (Tel.) 896-1100 (Fax) 896-1133; Structural Engineer: Mendenhall Smith - 3571 Red Rock Street, Ste. A, Las Vegas, NV 89103, (Tel.) 367-0725 (Fax) 367-2727; Civil / Landscape: Cardno WRG - 10649 Jeffreys St., Henderson, NV 89052 (Tel.) 990-9300 (Fax) 990-9305 as approved by City of North Las Vegas, 2250 Civic Center, North Las Vegas, NV 89030 and the Primary Contract between Owner and Contractor (hereinafter "the Prime Contract"), including all exhibits, and other documents attached hereto or made part hereof by reference to include but not limited to: Bid Documents, Owners Bid Instructions (IBI), Bid Addenda, Consultant Reports, Scope of Work, Schedule of Work, Contract General & Supplemental Conditions the Contract Documents and Plans & Specifications listed in Exhibit "A" subsequent modifications issued thereto. (All Contract Documents identified herein shall be hereinafter collectively referred to as the "Contract Documents").

Subcontractor UP

Page 1 of 18

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1.2 The Contract Documents are available in Contractor's office. Subcontractor acknowledges that it has carefully examined and fully understands the Contract Documents and site conditions. Additional copies of the Plans and Specifications will be provided to Subcontractor, upon request, at Subcontractor's Cost. Subcontractor shall, prior to the commencement of the Work, review and compare all of the Subcontract Documents relating to the performance of the Subcontractor and any and all errors, ambiguities and inconsistencies shall immediately be reported to the Contractor in writing and resolved to Subcontractor's satisfaction.

1.3 Subcontractor is bound to the Contractor to the same extent and duration that Contractor is bound to Owner. Subcontractor assumes toward Contractor all obligations, liabilities and responsibilities that Contractor, by the Contract Documents, has assumed toward APCO and Owner in the Prime Contract. Contractor shall further have the benefit of all rights, remedies, redress and limitations in respect to Subcontractor and all things done and used by Subcontractor in performance of its Work, which the APCO/Owner and its agents have against Contractor in the Contract Documents or by law. Any and all decisions by the APCO/Owner or its agents relative to interpretation of the Contract Documents or any ambiguity or discrepancy therein shall be binding on the Subcontractor to the same extent such are binding on Contractor. Subcontractor shall bind lower tier subcontractors and suppliers to full compliance with all Contract Documents, including all performance obligations and responsibilities which subcontractor assumes toward Contractor.

2. Scope of Work

2.1 Subcontractor agrees to furnish all supervision and labor, furnish and install all materials, equipment and supplies required, and do all things necessary to fully complete all its scope of work ("the Subcontract Work"), referred to in Exhibit "A": Subcontractor Scope of Work.

2.2 Subcontractor warrants to Contractor and Owner that all Work shall be performed in a neat, skillful, and workmanlike manner and will be fit for its intended use both as to workmanship and materials. Subcontractor agrees that all materials and equipment furnished by Subcontractor shall be new and of the best description and quality of their respective kinds, unless otherwise specified and ordered by Contractor in writing. Subcontractor warrants that the materials and equipment furnished and the Work performed will strictly comply with the Contract Documents and this Subcontract, and shall be satisfactory to Owner and Contractor. If the work or material is found to be noncompliant and deemed unacceptable by the SIA, General Contractor or the Owner, the total cost of remedial repair, inclusive of testing, inspections and any additional, labor cost associated with remedial work by others, will be the sole responsibility of the subcontractor.

2.3 Subcontractor understands and agrees to the Scope of Work included in the Plans and Specifications requirements as it pertains to the Subcontractors work. Subcontractor will cooperate and participate in Partnering Meetings Sponsored by Owner.

3. Equal Opportunity Clause

During the performance of any contract, Subcontractor, unless exempt, agrees to comply with Executive Order 11246 (Equal Opportunity Clause); Executive Order 11701 (Job Openings for Veterans); 41 CFR 60-741 et. Seq., 41 CFR 60-250 (a) and 41 CFR 60-741.5 (Employment for Handicapped) as follows:

3.1 Subcontractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. Subcontractor will take affirmative action to ensure that color, religion, sex or national origin. Such action shall include, but not limited to the following; employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. Subcontractor agrees to post in conspicuous places, available to employee and applicants for employment, notices to be provided by the government contracting officer setting forth the provisions of this nondiscrimination clause.

Subcontractor 

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- 3.2 Subcontractor will, in all solicitations or advertisements for employees placed by or on behalf of Subcontractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.
- 3.3 If picketing arises at the jobsite and Contractor establishes a reserved gate for Subcontractor's use and access, it shall be the obligation of Subcontractor to continue the proper performance of its Work without interruption or delay. Subcontractor shall notify in writing and assign its employees, labors, subcontractors and suppliers to such gates or entrances as may be established for its use by the contractor and in accordance with such conditions and at such times as may be imposed by Contractor. Strict compliance with Contractor's gate usage procedures shall be required by Subcontractor, who shall be responsible for such gate usage by its employees, labors, subcontractors and suppliers, and their respective employees, labors, subcontractors and suppliers.
- 3.4 It is the Subcontractor's responsibility to maintain an adequate work force to complete the project on schedule. If the Subcontractor or his employees are the reason for work stoppage, the subcontractor will be responsible for any delay to the construction schedule and held liable for schedule correction, inclusive of overtime and monetary claims by other Subcontractors.
4. Contract Price and Payments
- 4.1 In consideration of the strict and complete and timely performance of all Subcontract Work, Contractor agrees to pay Subcontractor in the payment quantities and schedules as is more fully described in Exhibit "A": Subcontractor's Scope of Work.
- 4.2 In Consideration of the promises, covenants and agreements of Subcontractor herein contained, and the full, faithful and prompt performance of the Work in accordance with the Contract Documents, Contractor agrees to pay, and Subcontractor agrees to receive and accept as full compensation for doing all Work and furnishing all materials and equipment contemplated and embraced in this Subcontract, and for all loss or damage arising out of the nature of said Work, or from all actions of the elements or from any unforeseen difficulties or obstacles which may arise or be encountered in the performance of the Work, and for all risks of every description connected with the Work, and for all expense incurred by or in consequence of the suspension, interruption or discontinuance of the Work, and for well and faithfully completing the Work and the whole thereof in the manner and according to the requirements and instructions of Contractor and Owner or Owner's agents in charge of the Work, if any, payment in the amount of the Subcontract Price.
- 4.3 Subcontractor, upon request of Contractor, and on such date as Contractor shall designate, shall submit to Contractor, in form and content acceptable to Contractor, a monthly billing, (1) originals, showing quantities of Subcontract work that has been satisfactorily completed in the preceding month, as well as backup material, by Schedule of Values, for same for submittal to the Owner. Subcontractor shall also submit an original executed Conditional Release, in the form required by Contractor, verifying payment of all laborers, subcontractors, equipment and material suppliers. Subcontractor shall also furnish required releases from any sub-subcontractors and/or materials suppliers that have notified Contractor of their presence on the Project. Subcontractor further agrees to provide all required employment security department, fringe benefit trust funds, certified payroll, and/or other reports as may be required by the Contractor or the Contract Documents. Subcontractor will provide Unconditional Lien Releases upon receipt of payment of any monies provided the subcontractor, inclusive of deposits, fees or prior months billing. No checks will be issued or printed subject to delays in receipt of unconditional lien releases. All Unconditional Lien Releases shall be inclusive of sub-tier contractors and suppliers.
- 4.4 Progress payments will be made by Contractor to Subcontractor within 15 days after Contractor actually receives payment for Subcontractor's work from Owner. The progress payment to Subcontractor shall be one hundred percent (100%) of the value of Subcontract work completed (less 10% retention) during the preceding month as determined by the Owner, less such other amounts as Contractor shall determine as

being properly withheld as allowed under this Article or as provided elsewhere in this Subcontract. The estimates of Owner as to the amount of Work completed by Subcontractor shall be binding upon Contractor and Subcontractor and shall conclusively establish the amount of Work performed by Subcontractor. As a condition precedent to receiving partial payments from Contractor for Work performed, Subcontractor shall execute and deliver to Contractor, with its application for payment, a full and complete release (Forms attached) of all claims and causes of action Subcontractor may have against Contractor and Owner through the date of the execution of said release, save and except those claims specifically listed on said release and described in a manner sufficient for Contractor to identify such claim or claims with certainty. Upon the request of Contractor, Subcontractor shall provide an Unconditional Waiver of Release in form required by Contractor for any previous payment made to Subcontractor. Any payments to Subcontractor shall be conditioned upon receipt of the actual payments by Contractor from Owner. Subcontractor herein agrees to assume the same risk that the Owner may become insolvent that Contractor has assumed by entering into the Prime Contract with the Owner.

- 4.5 Contractor shall have the right at all times to contact lower tier subcontractors and suppliers to verify that they are being paid by Subcontractor for labor or materials furnished for use in the Subcontract Work. If it appears that labor, material or other costs incurred in the performance of the Subcontract Work are not being paid when due, Contractor may take whatever steps it deems necessary to insure that the progress payments will be utilized to pay such costs, including, but not limited to, the issuance of joint checks payable to the claimant after written notice to Subcontractor, or additionally, making payment directly to claimant after written notice to Subcontractor. If such payment by Contractor exceeds the balance of payments due or to become due to Subcontractor from Contractor, then Subcontractor shall be liable to Contractor for the difference. If the Owner requests proof of payment to a Sub-tier-contractor or supplier, the subcontractor obligated to provide same in a timely manner.
- 4.6 Contractor is hereby expressly granted the right to off-set any sums due the Subcontractor under the provisions of this Subcontract against any obligation that may be due from Subcontractor to Contractor regardless of the source of said obligation. When requested by Contractor, Subcontractor shall furnish to Contractor a verified and itemized statement showing the names and addresses of all entities who have furnished or may furnish labor, materials, and/or equipment for the Subcontract Work together with the amount due or to become due for such work.
- 4.7 The 10 percent withheld retention shall be payable to Subcontractor upon, and only upon the occurrence of all the following events, each of which is a condition precedent to Subcontractor's right to receive final payment hereunder and payment of such retention: (a) Completion of the entire project described in the Contract Documents; (b) The approval and final acceptance of the project Work by Owner; (c) Receipt of final payment by Contractor from Owner; (d) Delivery to Contractor from Subcontractor all as-built drawings for its scope of work and other close out documents; (e) Delivery to Contractor from Subcontractor a Release and Waiver of Claims from all of Subcontractor's laborers, material and equipment suppliers, and subcontractors providing labor, materials or services to the Project, (Forms attached). If any sub-subcontractor, supplier or other person refuses to furnish a release or waiver required by the Owner or Contractor, the Subcontractor shall, upon the request of Contractor, furnish a bond satisfactory to the owner and Contractor to indemnify them against any such claim or lien. Should the existence of any unsatisfied or un-discharged claim, obligation or lien arising in conjunction with Subcontractor's Work become known after final payment is received from Contractor, Subcontractor shall promptly pay on demand all actual amounts Contractor and/or Owner pay in bonding around, satisfying, discharging or defending any such claim, obligation or lien, including all costs and attorney's fees incurred in connection therewith. Final payment shall not relieve Subcontractor from liability, or for warranty or guaranty, or for indemnity obligations for faulty or defective Work.
- 4.8 Subcontractor agrees that Contractor shall have no obligation to pay Subcontractor for any changed or extra work performed by Subcontractor until or unless Contractor has actually been paid for such work by the Owner.

- 4.9 Progress payments and Final Payment shall not be considered or construed as evidence of acceptance of any part of Subcontractor's work until final acceptance of the Project by Owner.

5. Liquidated Damages

- 5.1 Subcontractor acknowledges that liquidated damages are identified in the prime contract between the owner and contractor. If the owner exercises Liquidated Damages against contractor due to causes by the subcontractor, then contractor shall have recourse to collect those funds from any unpaid balances due subcontractor. If subcontractor's unpaid balance cannot satisfy the total amount of damages due, then Subcontractor agrees to interest of 1.5 % per month of the unpaid balance until paid in full.

6. Prosecution of Work

- 6.1 TIME IS OF THE ESSENCE OF THIS SUBCONTRACT.

6.1.1 Eight (8) copies of all Subcontractor submittals shall be received by Contractor to suit the requirements of the approved CPM target schedule unless otherwise agreed to in writing by Contractor. Subcontractor agrees to provide plan-sized sheets for all submittals of required size 24"x36" including one (1) set of and seven (7) blue line prints. Product specifications shall be provided in standard 8-1/2" by 11" paper, three hole punched and inserted into three ring binders. Any required re-submittals shall be submitted as required by contract documents from the Owner.

6.1.2 Final acceptance and approval of this Subcontract Agreement is contingent upon approval of Subcontractor's Submittals by the Owner/Architect/Engineer.

6.1.3 Any delays in the submittal process caused in whole or part by Subcontractor may be grounds for immediate termination of this Subcontract Agreement and subject Subcontractor to damages as provided in Sections 8 and 9 below.

- 6.2 Subcontractor agrees to commence the Subcontract Work within five (5) calendar days after receiving notification from Contractor to proceed, or within such other time as may be specified by Contractor, and to proceed at such points as Contractor may designate, and to continue diligently in its performance in accordance with the project schedule and at a pace that will cause no delay in the progress of the Contractor's or other subcontractor's work.

- 6.3 Upon request, Subcontractor shall promptly provide Contractor with scheduling information, in the format required in the Contract Documents, or any other information relating to the order or nature of the Subcontract Work. Subcontractor agrees that the project schedule may be revised by Contractor as work progresses. Contractor may require Subcontractor to prosecute segments of the Subcontract Work in phases as Contractor may specify. Subcontractor shall comply with instructions given by Contractor, including any instructions to suspend, delay or accelerate the Subcontract Work. Subcontractor shall not be entitled to any extra compensation from Contractor for any such suspension, delay or acceleration unless specifically agreed to in writing by the Contractor and Owner and paid for by Owner. The Owner's payment to Contractor of extra compensation for any such suspension, delay, or acceleration shall be a condition precedent to Subcontractor's right, if any, to receive such extra compensation from Contractor.

- 6.4 Subcontractor shall keep the work area reasonably clean of debris, daily, resulting from the performance of its work and shall remove from the work area all debris generated by the execution of the Subcontract work. Non-compliance with verbal direction from Prime Contractor's Project Superintendent for cleanup shall result in one (1) written notice for clean-up. Upon failure to properly police the debris from their own activity, 24 hours after written notification this subcontractor will be fined \$500.00 plus the cost for clean-up deducted from your next pay application.

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- 6.5 Subcontractor, in undertaking to complete the Subcontract Work within the time specified, avows that it has considered ordinary delays incident to such work; including, but not limited to delays in securing materials, equipment or workmen, and minor changes, omissions or additions, unavoidable casualties, normal weather conditions, strikes or lockouts. If Subcontractor shall be delayed in the performance of the Work by any act or neglect of the Owner or Architect, or by agents or representatives of either, or by changes ordered in the Work, or by fire, unavoidable casualties, national emergency, or by any cause other than the intentional interference of Contractor, Subcontractor shall be entitled, as Subcontractor's exclusive remedy, to an extension of time reasonably necessary to compensate for the time lost due to the delay, but only if Subcontractor shall notify Contractor in writing within twenty four (24) hours after such occurrence, and only if Contractor shall be granted such time extension by Owner. No time extension will be allowed for delays or suspensions of work caused or contributed to by Subcontractor, and no time extension will be granted Subcontractor that will render Contractor liable for liquidated damages or other loss under the Contract Documents. The Subcontractor understands that this is an aggressive schedule and that should the Subcontractor fail to staff the Project with the proper workforce, to stay on schedule, then it is understood that the Subcontractor will have its workforce work overtime and/or weekends to maintain the pace of the schedule solely at the subcontractors expense.
- 6.6 In addition to other damages and remedies provided in this Subcontract, Subcontractor agrees to pay any liquidated damages that may be assessed against the Contractor by the Owner, as provided in the Contract Documents, for any project delays caused by Subcontractor. Such damages shall be paid for each working day the Subcontract Work remains incomplete beyond the time specified for subcontract completion plus any extension thereof agreed to in writing by the Contractor, and granted by Owner.
- 6.7 Contractor shall not be liable to Subcontractor for delays caused by reason of fire or other casualty, or on account of riots, strikes, labor trouble, terrorism, acts of God, cataclysmic event, or by reason of any other event or cause beyond Contractor's control, or contributed to by Subcontractor.
- 6.8 All Subcontract work done and all Subcontract materials delivered to the project site shall become Contractor's property, and said material shall not be removed by Subcontractor or any other party from the project site without Contractor's written consent. After completion and final acceptance of the Subcontract work and final payment, Subcontractor shall promptly remove all remaining material, equipment and debris of Subcontractor.
7. Changes and Claims
- 7.1 Contractor may order or direct changes, additions, deletions or other revisions in the Subcontract work without invalidating the Subcontract. No changes, additions, deletions, or other revisions to the Subcontract shall be valid unless made in writing. Subcontractor mark up shall be limited to that stated in the contract documents in addition to the direct/actual on-site cost of the work, however, no profit and overhead markup on overtime shall be allowed.
- 7.2 Subcontractor, prior to the commencement of such changed or revised work, shall submit, (within 24 hours of request) to Contractor, written copies of the breakdown of cost or credit proposal, including work schedule revisions, for changes, additions, deletions or other revisions in a manner consistent with the Contract Documents. Contractor shall not be liable to Subcontractor for a greater sum, or additional time extensions, than Contractor obtains from Owner for such additional work, less reasonable overhead and profit due to Contractor, and also less professional and attorney's fees, costs, and other expenses incurred by Contractor in the collection of any such sum or time extension. Payment to Subcontractor for such work shall be conditioned upon Contractor's actual receipt of payment from the Owner and such payment by Owner to Contractor with whatever documentation or support, as Contractor may deem necessary to negotiate with Owner.

7.3 In any dispute between Contractor and Owner as to amount, classification, price, time or value of Subcontract Work, or any Subcontract material or supplies, or any delay in the prosecution of the Subcontract work caused by Owner, or any other matter whatsoever pertaining to the Subcontract work, Subcontractor agrees to promptly and adequately provide Contractor with whatever documentation or support as Contractor may deem necessary to negotiate with Owner.

7.4 Contractor may dispute, appeal, resist, litigate or arbitrate any decision of Owner, without being deemed to have admitted any obligation or liability to Subcontractor, and if the decision shall be against Contractor, then Subcontractor shall be bound thereby. Subcontractor may, at its own expense, participate with Contractor in arbitration or legal proceedings. Subcontractor shall bear part or all costs, including attorneys' fees and legal expenses, incurred by Contractor in any such proceeding involving a claim, which, if allowed, would result in one or more payments to Subcontractor. Subcontractor's costs shall bear to the total amount sought in the proceeding. Prosecution of any such claim or proceeding shall be at the sole risk of Subcontractor, and Contractor shall have no liability for or in relation to the outcome.

8. Assignments

8.1 Subcontractor shall not assign or sublet the Subcontract or any part of the Subcontract Work or any payments due hereunder, without prior written consent of Contractor. Any such assignment made by Subcontractor without Contractor's prior written consent is void, and shall be grounds for termination of this Subcontract by Contractor, terminates the Subcontractor's right to any further payment and authorizes Contractor to withhold all monies due or to become due to Subcontractor.

9. Taxes

9.1 All applicable taxes, contributions, interest and/or penalties due under any federal, state, county or municipal statute or regulation arising from Subcontractor's Work are included in the price to be paid to Subcontractor under the Subcontract. Subcontractor shall indemnify, defend, and save Contractor and Owner harmless from all liability, loss, and expense resulting from Subcontractor's failure to satisfy such obligations. Subcontractor shall, on demand, provide proof that all taxes and other charges have been, and are being properly paid.

9.2 If Contractor is assessed or charged for any Subcontractor taxes, contributions, interest or penalties, Contractor shall have the right to withhold such amount from funds due or to become due under the Subcontract, and to pay directly to taxing authorities any sums otherwise due Subcontractor, but not otherwise subject to offset in accordance with Section 3 above, upon receipt of a tax levy from such taxing authority.

10. Default and Termination

10.1 If, in the opinion of Contractor or Owner, Subcontractor fails, at any time, to supply a sufficient number of properly skilled workmen or sufficient materials and equipment of the proper quality; or fails to adequately or timely perform the Subcontract work to the satisfaction of Contractor or Owner; or becomes insolvent or makes any filing under the Acts of Congress relating the bankruptcy; or fails, neglects and/or refuses to comply with the project plans and specification; or fails to perform the Subcontract work in a good and workmanlike manner; or causes any stoppage of the work of the other trades upon the project; or fails to correct defective work; or fails to comply in any other respect with the terms and conditions of this Subcontract, Contractor may declare a default by Subcontractor as herein provided.

10.2 Contractor shall provide prompt written notice of default to Subcontractor, by regular mail or as may otherwise be considered to reasonably provide notice to Subcontractor at Subcontractor's place of business described above. Such notice shall be complete upon deposit at a regular receptacle of the U.S. mail, Fax Transmission or upon actual hand delivery as provided herein.

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In the event of default by Subcontractor as provided above, Contractor may, at his option, demand Subcontractor to cure or otherwise correct the default and breach within three calendar days after written notice by Contractor. If, after three days, Subcontractor has failed to cure and correct the default, Contractor may, at his sole option, provide any such labor, materials or equipment as may be necessary to complete the Work covered by this Subcontract Agreement and thereafter deduct the cost thereof from any money then due or thereafter to become due to Subcontractor under this Agreement. Alternatively, Contractor may terminate Subcontractor's right to proceed with the Work and thereafter enter upon the premises and take control of all materials, tools, equipment, and/or appliances of Subcontractor, and may employ any other person, persons, or organizations to finish the Work and provide the labor, materials and equipment to accomplish that purpose. Following completion of the Work by the Contractor or other persons or organizations, all unused materials, tools, equipment and/or appliances shall be returned to Subcontractor. Subcontractor shall not be entitled to rent or payment of any kind for the use of Subcontractor owned equipment or materials, nor shall Contractor be liable for any damages arising from said use unless resulting from gross negligence, or willful destruction by Contractor.

In the event Subcontractor has provided a payment or performance bond to Contractor, in accordance with Section 10 of this Agreement, and following expiration of the three days cure period, Contractor will make notice and demand by registered mail upon Subcontractor's surety to complete the Work covered by this Subcontract Agreement. In the event Subcontractor's surety fails to notify Contractor within (10) days after receipt of notice and demand by Contractor of surety's election to complete the work on behalf of Subcontractor, such failure shall be deemed a waiver by surety to exercise its rights to complete the Work. Thereafter, Contractor may at his sole option, complete the Work as otherwise provided by this Section.

- 10.3 In case of any such termination of Subcontractor's right to proceed with the Work, Subcontractor shall not be entitled to receive any further payment under this Subcontract Agreement until the Work undertaken by Contractor in his prime contract is completely finished. At that time, if the unpaid balance of the amount to be paid under this Agreement exceeds the expenses incurred by Contractor in finishing Subcontractor's Work, such excess shall be paid by Contractor to Subcontractor; but, if such expense shall exceed the unpaid balance, then Subcontractor shall promptly pay to Contractor the amount by which such expense exceeds the unpaid balance.

"Expense" as referred to in this Section shall include all direct and indirect costs incurred by Contractor for furnishing labor, materials, and equipment to complete the Work covered by this Subcontract Agreement. "Expense" shall further include, but shall not be limited to, replacement of Subcontractor costs, liquidated damages incurred by Contractor, extended field office overhead, and home office overhead, Contractor's attorneys fees and costs, and any and all other damages sustained by Contractor by reason of Subcontractor's default.

- 10.4 In the event Contractor elects to use its own labor forces to complete Subcontractor's Work, Subcontractor and Subcontractor's surety agree to pay Contractor for such Work at the following rates: (a) Labor - At Contractor's then prevailing labor rates, plus labor burden, including, but not limited to, employment taxes, liability insurance, workmen compensation insurance, and all other benefits; (b) Contractor Owned Equipment-At the then prevailing Equipment Rental Rates as established by the Blue Book for Construction Equipment as published by Data Quest; all rental costs shall be determined by dividing the monthly rental rate by twenty-two days per month to determine a daily rental rate. Hourly rental rates shall be determined by dividing the daily rate by eight; (c) Materials, Rental Equipment-Direct Invoice Costs, including transportation, if any; (d) Replacement Subcontractor-Direct Invoice Costs paid Replacement Subcontractor; (e) Field and home office overhead; (f) Ten percent profit on all expenses indicated in a-e above.

In lieu of computing overhead, as provided for above, Contractor may, at his sole option, elect to assess a charge, on items a, b, and c above, of 15% for General Overhead expenses. In addition, Contractor may assess a charge on items a, b, and c above 10% for Profit. Contractor shall be entitled to an additional markup on any and all of such expenses. Contractor shall also be entitled to an additional markup of 6% for General Overhead and 10% for Profit on all expenses and cost incurred pursuant to item d and e above.

10.5 If the cost to complete the Subcontract work is more than the unpaid balance of the Subcontract, then Subcontractor shall be liable to Contractor for the deficiency, and Contractor may hold, sell or otherwise realize upon any Subcontractor materials or equipment, or take other steps to collect the deficiency, including making a claim against Subcontractor's surety.

10.6 Whether Contractor exercises one or more of the above options or rights, nothing contained herein shall release Subcontractor within the specified time. Subcontractor agrees in the event of default that it will immediately assign and turn over to Contractor all sub-contracts, material contracts, or orders, bills of lading for material en route, and any other necessary data or information that would minimize the cost of completion of the Subcontract work.

11. Termination for Convenience

11.1 Right to Terminate for Convenience. The Contractor shall have the right to terminate for convenience, at any time, and with or without cause, Subcontractor's performance of all or part of the Subcontract or Subcontract Work, as defined in paragraph 2.1.

11.2 Notice to Subcontractor. The Contractor shall provide Subcontractor with written notice of the termination two calendar days in advance of the effective date of the termination. The two-day period shall begin to run upon receipt of the termination for convenience notice by the Subcontractor.

11.3 Subcontractor's Obligations. Upon receipt of the written notice of termination, the Subcontractor shall:

- A. Stop all work or its performance of all the Subcontractor or Subcontract Work that has been terminated, or stop work on the part of the Subcontract Work that has been terminated if its performance of only part of the Subcontract Work has been terminated.
- B. Enter into no further sub-subcontracts or place any orders for supplies, materials, or facilities, except as necessary to complete any portion of the Subcontract Work not terminated for convenience.
- C. Terminate all sub-subcontracts or orders to the extent related to the terminated Subcontract Work.
- D. As directed by the Contractor, transfer title and deliver to the Contractor any fabricated or unfabricated parts, work in progress, completed work, supplies, and other materials produced or acquired for the Subcontractor or Subcontract Work terminated and the completed or partially completed plans, drawings, information, and other property that, if the Subcontract had been completed, the Subcontractor would be required to furnish to the Contractor.
- E. Complete non-terminated portions of the Subcontract Work if the Subcontractor's performance of only a part of the Subcontract Work has been terminated.
- F. Use its best efforts to sell, as directed by the Contractor, any materials of the types referred to in paragraph (D) above; provided, however, that the Subcontractor is not required to extend credit to any purchaser of this material and may acquire the material under the conditions prescribed by, and at prices approved by, the Contractor. The proceeds from the sale of such material shall be applied to reduce any payment due from the Contractor under this Subcontract, and credited to the price or cost of the Subcontract Work, or paid in any other manner directed by the Contractor.
- G. Submit with 60 days of the effective date of termination, to the Contractor, a written termination claim, along with all documentation required to support the claim.

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H. Take any other action toward termination as directed by the General Contractor.

11.4 Effect of Owner's Termination of Contractor: If there has been a termination of the Contractor's contract with the Owner, the Subcontractor shall be paid the amount due from the Owner to the Contractor for the Subcontractor's completed work, as provided in the Contract Documents, after payment by the Owner to the Contractor.

11.5 Compensation: If the Contractor's contract has not been terminated, the Contractor shall pay the Subcontractor as follows:

- A. The direct cost of the work performed by Subcontractor prior to termination.
- B. Overhead, general, and administrative expenses (including those for any sub-subcontracts) in an amount equal to 5% percent of direct costs.
- C. 5% percent profit of the total of the amounts allowed in paragraphs (A) and (B) above. If, however, it appears that the Subcontractor would have sustained a loss on the entire Subcontract had it been completed, no profit shall be compensated by the Contractor, and the amounts paid for the termination shall not be compensated for.

11.6 Items Not Compensated: The Subcontractor shall not be compensated for.

- A. Any accounting, legal, clerical, or other expenses incurred by the Subcontractor in the preparation of the Subcontractor's termination claim.
- B. Unabsorbed overhead and anticipated lost profits.

11.7 Permitted Deductions: The Contractor shall be entitled to deduct from any payment due the Subcontractor (A) any advance payment it has made to the Subcontractor for work not yet performed under the terms of the Subcontract and (B) the amount of any claim that the Contractor has against the Subcontractor.

11.8 Consideration: If no work has been performed by the Subcontractor at the time of termination, Subcontractor shall be paid the sum of \$100.00 for its undertaking an obligation to perform.

11.9 Settlement and Release of Any and All Claims: The settlement of termination costs pursuant to Paragraph 9.5 of this Clause shall constitute a settlement and release of any and all claims, known and unknown by the Subcontractor, arising prior to termination.

12 Bonds

12.1 Should the Contractor or project specifications require it, the Subcontractor shall execute a Labor and Material Bond and Faithful Performance Bond and Guaranty Bond in an amount equal to 100% of the Subcontract Price in Section 3. Said bonds shall be executed by a corporate surety acceptable to and entities to the same extent as may be required of Contractor pursuant to the Prime Contract. The cost of the bonds shall be included in the Subcontract amount. The terms of this Subcontract Agreement are incorporated by reference into the bonds required by this section, and the terms, conditions, and remedies of Contractor, shall prevail over any similar terms contained in said bond. By issuing a bond to Subcontractor pursuant to this Agreement, the Subcontractor's surety specifically agrees to be bound to Contractor to the same extent and in the same amount as Subcontractor.

13 Indemnity and Insurance

Subcontractor: 

13.1 **INSURANCE REQUIREMENTS** – Unless the Contract Documents require otherwise, Subcontractor agrees to procure and maintain, at his sole cost and expense, the following insurance coverage,

1. **Worker's Compensation:** Coverage A. Statutory policy form; Coverage B. Employer's liability; Bodily injury by accident - \$1,000,000 each accident; Bodily injury by disease - \$1,000,000 each employee. Coverage shall be maintained in accordance with NRS 616 and 617.
2. **Commercial Auto Coverage:** Auto liability limits of not less than \$1,000,000 each accident, Aggregate Limit - \$2,000,000, combined bodily injury and property damage liability insurance including, but not limited to, owned autos, hired or non-owned autos.
3. **Comprehensive General Liability or Commercial General Liability, "Occurrence Form" only.** "Claims Made" is not acceptable. The limits of liability shall not be less than:
 - a) **Comprehensive General Liability:** \$1,000,000 combined single limit bodily/property damage per occurrence or,
 - b) **Commercial General Liability:** The limits of liability shall not be less than: Each Occurrence limit - \$1,000,000, Aggregate Limit - \$2,000,000; Personal Injury limit - \$1,000,000; Products Completed Operations Aggregate Limit - \$5,000,000; General Aggregate Limit (other than products-completed operations).
4. **Excess Liability: Umbrella Form or Follow Form Excess** where necessary to meet required minimum amounts of coverage.
5. **Any deductible or self-insured retention must be declared on the Certificate and is subject to prior approval.**

Liability Policy forms must include: a) Premises and operation with no X, C or U exclusions; b) Products and completed operations coverage (Subcontractor agrees to maintain this coverage for a minimum of 1 year following completion of his work); c) Full blanket contractual coverage; d) Broad form property damage including completed operations or its equivalent; e) An endorsement naming APCO Construction (its officers, employees and agents) and any other required interest as additional insured(s); f) An endorsement stating: "Such coverage as is afforded by this policy for the benefit of the additional insured(s) shall be noncontributing with the coverage provided under this policy."

6. **Other Requirements:** (a) All policies must contain an endorsement affording an unqualified thirty (30) days notice of cancellation to the additional insured(s) in the event of cancellation or reduction in coverage; (b) All policies must be written by insurance companies whose rating in the most recent Best's rating guide, is not less than A:VII Rating must be shown on Certificate under "Companies Affording Coverage"; (c) Certificates of insurance with the required endorsement evidencing the coverage must be delivered to APCO Construction prior to commencement of any work under this Contract; (see attached samples) (d) If the Subcontractor fails to secure and maintain the required insurance, APCO Construction shall have the right (without obligation to do so, however) to secure same in the name and for the account of the Subcontractor in which event the Subcontractor shall pay the costs thereof and furnish upon demand all information that may be required in connection therewith. (e) Liability insurance policies containing warranties must be reviewed for prior approval and acceptance by Contractor/Owner. (f) The Subcontractor's insurance shall be primary with respects to APCO Construction, its officers, employees and volunteers.

13.2 **INDEMNIFICATION**

Subcontractor 

- a) **General Indemnity:** All work covered by this agreement that is performed at the project site, or performed in preparing or delivering materials or equipment to the project site, or in providing services for the Project, shall be at the sole risk of the Subcontractor. Subcontractor, to the fullest extent permitted by law, with respect to all such work which is covered by or incidental to this agreement, shall defend all claims through legal counsel acceptable to Contractor, and indemnify and hold Contractor, its insurance carriers and bonding companies, Owner and any other interested party designated by Contractor, or their agents, employees or representatives (collectively referred to as "Indemnities") harmless from and against any claim, liability, loss, damage, cost, expense, including attorney's fees, awards, fines or judgments arising by reason of the death or bodily injury to persons, injury or damage to tangible property, including the loss of use therefrom, whether or not it is caused in part by an Indemnities; provided, however, that the Subcontractor shall not be obligated under this agreement to indemnify the Indemnities with respect to damages which are ultimately determined to be due the sole negligence or willful misconduct of the Indemnities.
- b) **Indemnity Not Limited:** in any and all claims against the Indemnities by any employee of the Subcontractor, or lower tier subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Paragraph shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable under any Workers' or Workmen Compensation Acts, disability benefit acts or other employee benefit acts. Said indemnity is intended to apply during the period of this Agreement and shall survive the expiration or termination of the Agreement until such time as action on account of any matter covered by such indemnity is barred by the applicable Statute of Limitations.

14. **Warranty and Guarantee**

- 14.1 Subcontractor agrees to promptly repair, rebuild, replace or make good, without cost to Contractor or Owner, any defects due to faulty workmanship and/or materials which may appear within the guarantee or warranty period established in the Contract Documents. If no such period is stipulated in the contract Documents, then Subcontractor's guarantee shall be for a period of one year from the date Certificate of Occupancy is obtained for the project. Subcontractor shall require similar guarantees from all vendors and lower tier subcontractors.

15. **Patents**

- 15.1 Subcontractor agrees to pay all applicable patent royalties and license fees and to defend all suits or claims made for infringement of any patent rights involved in the Subcontract work.

16. **Compliance with Regulations, Applicable Law and Safety**

- 16.1 All Work, labor, services and materials to be furnished by Subcontractor shall strictly comply with all applicable federal, state, and local laws, rules, regulations, statutes, ordinances, building codes, and directives now in force or hereafter in effect as may be required by the Prime Contract. Subcontractor shall satisfy and comply with the foregoing as a part of the Subcontract without any additional compensation.
- 16.2 Subcontractor agrees that the prevention of accidents to workmen engaged in the work under the Subcontract is solely its responsibility. If requested, Subcontractor shall submit a safety plan for review by Contractor. Contractor's review of any safety plan shall not be deemed to release Subcontractor, or in any way diminish its indemnity or other liability as assumed under the Subcontract, nor shall it constitute an assumption of liability by Contractor. (See Section 5.8 for additional requirements)

- 16.3 When so ordered, Subcontractor shall stop any part of the Work that the Contractor or Owner deems unsafe until corrective safety measures, satisfactory to Contractor and or Owner, have been taken. Should Subcontractor neglect to adopt such corrective measures, Contractor may do so and deduct the cost from payments due or to become due to Subcontractor. Upon request, Subcontractor shall timely submit copies of all accident or injury reports to Contractor.
- 16.4 Subcontractor agrees to cooperate with the Contractor in efforts to prevent injuries to workmen employed by either party in carrying out operations covered by this agreement, and to adopt and place in effect OSHA requirements and such practical suggestions as may be offered by the Contractor and/or the Owner to promote safety and safe working conditions. Should the Subcontractor fail to fulfill its obligations in relation to safety matters on the job site, at the option of the Contractor, this Agreement, upon ten (10) days written notice to Subcontractor, may be cancelled, and the Subcontractor required to immediately remove his equipment and employees from the project.
17. Damage to Work
- 17.1 All loss or damage to Subcontractors' work resulting from any cause whatsoever shall be borne and sustained by Subcontractor and shall be solely at its risk until final acceptance by Contractor, Owner, or Owner's Representative. Subcontractor shall at its sole expense promptly repair or replace damage to the work of others, or to any part of the project, resulting from Subcontractor's activities.
18. Inspection and Approvals
- 18.1 Contractor and Owner at all times shall have the right to inspect Subcontractor's materials, workmanship and equipment. Subcontractor shall provide facilities necessary to effect such inspection, whether at the place of manufacture, the project site, or any intermediate point. This point of inspection may be exercised at any time during performance of the Subcontract Work.
- 18.2 Any Subcontract work or material furnished that fails to meet the requirements or specifications of the Contract Documents, or the Subcontract, shall be promptly removed and replaced by Subcontractor at its own cost and expense. If, in the opinion of Contractor or Owner, it would not be economical or expedient to correct or remedy all or any part of the rejected Subcontract work or materials, then Contractor, at its option may deduct from payments due or to become due to Subcontractor either: (a) such amount as in Contractor's sole judgment represents the difference between the fair value of the Subcontract work and materials rejected and the value if same had been performed in full compliance with the Contract documents; or (b) such reductions in price that are provided for or determined for this purpose under the Contract Documents.
- 18.3 The Subcontractor shall keep on site: up to date "as-built" and Daily Reports, and update/maintain them daily and require its subcontractors and suppliers to keep and maintain all books, papers, records, files, accounts, reports, bid documents with backup data, and all other materials relating to the Contract Documents and Project.
- 18.4 All of the material set forth in paragraph 18.3 shall be made available to the Owner and to Contractor for auditing, inspection and copying and shall be produced, upon request, at either the Owner's offices or such other place as Contractor may specify. Said request for information shall be limited to instances when specifically required to comply with a request for information by the Owner, and should not be construed as a general right by Contractor to request proprietary or privileged information of Subcontractor.

19. Arbitration -- Contractor / Subcontractor

~~19.1~~ Contractor shall have the option to, and Subcontractor shall be required to resolve all claims, disputes and matters in question arising out of, or relating to the Subcontract, or breach thereof, except for claims which have been waived by the making or acceptance of final payment, by submission to arbitration in the time period and in accordance with the Contract Documents.

~~19.2~~ In accordance with Paragraph 17.1, Subcontractor hereby waive its right to otherwise litigate any and all such disputes, claims and matters in question in any court or governmental tribunal in any jurisdiction. If Subcontractor submits any matter to arbitration hereunder, at its sole option, Contractor may refuse to arbitrate any such disputes, claims, and matters in question. In that event, and in only that event, Subcontractor may litigate the matters subject to its demand for arbitration.

19.3 All arbitration and other legal proceedings instituted pursuant to this Section shall be conducted in the same County the work was performed, or at such other venue as Contractor and Subcontractor shall agree to in writing.

~~19.4~~ The award rendered by the arbitrator(s) shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction.

19.5 Unless otherwise agreed in writing, the Subcontractor shall carry on the Subcontract work and maintain the schedule of work pending arbitration or litigation, and the Contractor shall continue to make payments in accordance with the Subcontract.

19.6 To the extent not prohibited by their contracts with others, the claims and disputes of Owner, Contractor, Subcontractor and other Subcontractors involving a common question of fact or law shall be heard by the same arbitrator(s) in a single proceeding.

~~19.7~~ This Agreement to arbitrate shall not apply to any claim of contribution or indemnity asserted by one party to the Subcontract against the other party and arising out of any action brought in a state or federal court, or in arbitration by a person who is under no obligation to arbitrate the subject matter of such action with either of the parties hereto; or does not consent to such arbitration.

~~19.8~~ In any dispute arising over the application of paragraph 19.7, all questions regarding the arbitration requirements of this section shall be decided by the appropriate court and not by arbitration.

20. Miscellaneous

20.1 Contractor's waiver of any of the provisions of the Subcontract, or Contractor's failure to exercise any options or legal remedies provided therein, shall not be construed as a general waiver of its right thereafter to require such compliance or to exercise such option or remedy.

20.2 The Subcontract, including all Contract Documents as provided in Section One, comprises the entire Agreement between the parties relating to the Subcontract Work and no other agreements, representations, terms, provisions or understandings concerning the Subcontract Work have been made. All modifications or amendments to the Subcontract must be in writing.

20.3 To the best knowledge and belief of the parties, the Subcontract contains no provision that is contrary to Federal or State law, ruling or regulation. However, if any provision of this Subcontract shall conflict with any such law, ruling or regulation, then such provision shall continue in effect to the extent permissible. The illegality of any provisions, or parts thereof, shall not affect the enforceability of any other provisions of this Subcontract.

20.4 The Subcontract shall be construed and interpreted according to the laws of the State of Nevada.

Subcontractor 

Page 14 of 18

20.5 In the event either party employs an attorney to institute a lawsuit or to demand arbitration for any cause arising out of the Subcontract Work or the Subcontract, or any of the Contract Documents, the prevailing party shall be entitled to all costs, attorney's fees and any other reasonable expenses incurred therein.

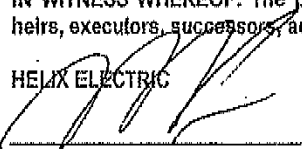
20.6 All sections and headings are descriptive only and are not controlling.

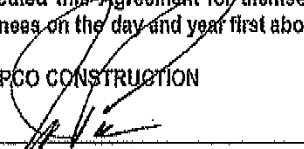
20.7 Contractor's rights and remedies under the Subcontract are not exclusive and Contractor shall have all other remedies available at law or in equity to enforce the Subcontract.

IN WITNESS WHEREOF: The parties hereto have executed this Agreement for themselves, their heirs, executors, successors, administrators, and assignees on the day and year first above written.

HELIIX ELECTRIC

APCO CONSTRUCTION


Victor Fuchs, President
NAME / TITLE


Joe Polan - Contract Manager
NAME / TITLE

DATED: APR 04 2012

DATED: 4/19/12

Subcontractor 

Page 15 of 18

JA219

EXHIBIT 'A'
Subcontractor Scope of Work
APCO Contract No. 193-B

This Agreement includes the supply of all labor, materials, tools, equipment, facility, fuel, supervision, management, permits and taxes necessary to complete all of the scope work listed below inclusive of but not limited to North Las Vegas located 2811 Pines and Specifications dated February, 2010 including work previously completed to complete the below listed scope of work for the project including Addendum Number(s) 1 & 2. Subcontractor acknowledges that he has performed his own bid of the bid and therefore, any items necessary to complete his work depicted in accordance with the Contract Documents, shall be included in this Agreement. This Subcontractor also acknowledges that all of the costs related to the successful completion of a complete system including any unforeseen or emergent items, or as described herein, is included in the costs reflected below. No Additional Work Authorization (AWA) or Change Order will be issued to Subcontractor unless the General Contractor or Owner reviews the scope of work shown on the Contract Documents. The scope of work, as defined by the contract documents, will be performed in National Industry Standards under the observation of the Special Inspection Agency, Inc., as provided by the Owner. The Sub, Owner, Owner Representative, Building Department and Quality Assurance Agency Inspectors, QAA will be present on the site during the installation of the scope of work listed below. The subcontractor will comply and cooperate with the Owner Representative and its agents, and the QAA as they perform quality assurance inspections as required by the Building & Safety Codes and Industry Standards.

The Scope of Work shall specifically include but not be limited to the following list of bid items:

ITEM #	DESCRIPTION	UNIT	QTY	PRICE	TOTAL
--------	-------------	------	-----	-------	-------

To furnish and install complete **Electrical Package** in accordance and with strict conformance with drawings, specifications and Addendums (1&2) at the time of Bid and throughout the duration of the Project including but not limited to:

Complete Set of Plans (dated 4/2011), Specifications (dated 10/2011) and Alternates 2-6

COMPLETE ELECTRICAL PACKAGE: \$2,356,520.00
(Excluding Trenching & Pole Bases)
BONDING @ (1%): \$23,565.20

The Contract total is (\$2,380,085.20) Two Million Three Hundred Eighty Thousand Eighty Five Dollars and Twenty Cents.

Our understanding of the qualifications / qualifications associated with your bid is as follows: Your proposal is hereby amended to reflect the terms and conditions of the subcontract. APCO Construction may at its option exercise its right to choose any or all bid alternate option items of work as shown on your proposal of the bid at the same price during the course of construction. Schedule of Values is for payment purposes and does not reflect any scope of work.

HELIIX ELECTRIC

Victor Fuchs, President

NAME / TITLE

DATED: APR 04 2012

APCO CONSTRUCTION

Joe Pelan - Contract Manager

NAME / TITLE

DATED: 4/19/12

**** Helix Exhibit - Attached ****

Subcontractor U.R.

Page 16 of 18

JA220

SPECIAL CONDITIONS

In addition to the conditions outlined in the Subcontract Agreement, the following Special Conditions shall form a part of the Subcontract Agreement.

- (a) The Subcontractor shall be responsible for clean up of employees break & lunch trash on the job site.
- (b) The Contractor will provide an adequate temporary construction area for staging. Contractor shall not supply subcontractor with forklift or security of materials or power, telephone, water or sewer at subcontractor's project trailer.
- (c) The Contractor will provide reasonable access to all working areas.
- (d) The Subcontractor shall be responsible for the Daily rough cleaning of his work area and removing its debris from the job site and all work shall be left in a clean condition following his activities. The APCO project manager/superintendent shall be the sole judge to determine the cleanliness.
- (e) The Contractor will provide one (1) set of full size conformed construction documents for the Subcontractor's use. Additional sets may be purchased by the Subcontractor from a source designated by the Contractor. Plan change drawings will be supplied in the same quantities.
- (f) Subcontractor must submit an accurate "Daily Work Report" (see attached Appendix 'C') prior to 10:00 a.m. the following day for all men power and work performed on the job site the previous day. Subcontractor monthly pay requests will not be accepted for processing unless all "Daily Work Reports" for the pay period have been submitted to the Contractor. Certified Payroll Reports are due to APCO Construction no later than 5 calendar days after the end of the month.
- (g) Subcontractor is required to submit a Pay Request representing all work performed on the job site on a monthly basis. The Pay Request must be submitted no later than the 25th of the month for all work performed during that month. Subcontractor shall use a format similar to AIA G702 & G703, NO EXCEPTIONS.
- (h) The Subcontractor is required to attend weekly site progress meetings ~~prepared~~ to discuss its progress or lack thereof and to participate in the preparation of Monthly updates of the Project schedule until scope of work is complete.
- (i) The Contractor cannot guarantee continuity of progress of work; Subcontractor shall employ as many mobilizations as required to complete the work as required by the project schedule.
- (j) Subcontractor shall at all times protect stored equipment, materials from: damage from weather, sun and is responsible to clean all mud, snow, etc from its materials prior to setting into its final position. Materials shall be stored off the ground and not in contact with the ground, and not in traffic areas subject to damage by vehicles or other construction activities.
- (k) APCO Construction cannot guarantee price stability and therefore cannot grant any additional monies to subcontractor due to escalation of price between bid/quote times and when materials/labor/shipping is actually purchased and/or incorporated into the project.
- (l) The Subcontractor shall provide drinking water for its own employees.
- (m) All applicable taxes, freight, shipping and land cargo insurance, etc. inclusive of unloading and handling related to the Subcontractor's scope of work is a part of the contract per the State of Nevada Revised Statutes.
- (n) The Subcontractor shall execute a Labor and Material Bond and Faithful Performance Bond and Guaranty Bond in an amount equal to 100% of the Subcontract Price.
- (o) NO Profit and Overhead markup on overtime shall be allowed unless contracted by Owner.

NOTICE TO ALL SUBCONTRACTORS

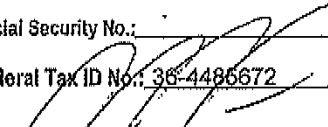
We have been requested by the Internal Revenue Service to comply with Regulation 1.604-1(d), which requires that we issue a 1099 Form on the compensation paid to you by APCO Construction.

Please indicate whether you are a Corporation or not and furnish your Social Security Number if you are not a Corporation or your Federal Tax ID Number, if you are a Corporation.

Corporation: Yes ☒ or No ☐

Social Security No.:

Federal Tax ID No.: 36-4486672

By: 
Signature Victor Fuchs

Date: APR 04 2012

Date

President
Title

Subcontractor

UR

Page 18 of 18

JA222



OCT. 26. 2011 11:49AM

NO. 5119 P. 1



Helix Electric
CONSTRUCTORS • ENGINEERS

Bid Proposal

October 26, 2011

VIA FAX (702) 734-0396

APCO
Attn: Max Hohn
3432 N. 6th Street
North Las Vegas, NV 89032
(702) 734-0198

PROJECT: Craig Ranch Regional Park Phase II

Helix Electric is providing a proposal for the electrical section for the Phase II park improvements at Craig Ranch Regional Park per drawings by Cardno WRG dated 8/23/11 and 10/3/11. Electrical drawings by TJK and MSA dated 10/6/11 were used in preparation of this proposal. NV Energy and Century Link utility drawings were received. Addenda 1 and 2 were received. Specifications dated April 2011 were received. All information contained in the bid documents is subject to our proposal qualifications.

Inclusions:

- Div0-1 General requirements as pertains to this craft only
- 024116- structure demolition as pertains to this craft only
- 024216- selective electrical demolition
- 078005- joint sealers as pertains to this craft only
- 083100- access doors and panels as pertains to this craft only
- 131500- water feature construction as pertains to this craft only
- 226200- water feature mechanical system as pertains to this craft only
- 260001- basic electrical requirements
- 260603- equip wiring connects
- 260519- low voltage electrical power conductors and cables
- 260526- grounding and bonding
- 260526- hangers and supports
- 260533- raceways and boxes
- 260553- Identification
- 260573- overcurrent protection device coordination study
- 262200- low voltage transformers
- 262413- switchboards
- 262416- panelboards
- 262716- electrical cabinets and enclosures
- 262726- wiring devices
- 262813- fuses
- 262816- enclosed switches
- 262816- enclosed contactors
- 266200- sports lighting
- 266800- exterior lighting
- 270533- conduit and back boxes for comm. Systems
- 271800- data/phone premise wiring system
- 328210- submersible lake recirculation pump electrical connections
- 328213- pump intake systems electrical connections
- 328400- irrigation system electrical connections
- 328420- lake recirculating water feature and transfer electrical connections
- 334713- lake/stream waterfall electrical connections

(CONTINUED)

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Helix Electric
Craig Ranch Park
October 26, 2011
Page 2

Base Bid:	\$ 1,830,000
Light Fixtures	ADD \$ 1,675,000
Alternate 1:	\$ 4,000,000
Alternate 2:	\$ 100,000
Alternate 3:	\$ 300,000
Alternate 4:	\$ 600,000
Alternate 5:	\$ N/A
Alternate 6:	\$ 100,000

**Alternates include light fixtures

Proposal Qualifications:

1. Wiring methods are typical for this type of construction and meet code requirements. This includes the use of MC cable, aluminum feeder conductors based on NEC sized conduit and conductors, die cast set-screw fittings, underbitch PVC conduits, embedded PVC conduits in above grade decks, PVC through-slab transitions, etc.
2. For any fixtures that are not specified, those fixtures are as selected by Helix Electric and subject to approval.
3. Exit and emergency lights are provided as shown on the electrical drawings. No provision is made for additional.
4. If any light fixtures, equipment, and materials are furnished by others they shall be provided to the jobsite complete with lamps, accessories, special mounting hardware, etc. All items shall be shipped fully assembled.
5. Any price breakouts are provided for accounting purposes only. This proposal is based on all parts performed under one continuous schedule.
6. Wages are based on prevailing rates.
7. This proposal is based on a 12 month schedule.
8. This proposal is based on work performed during regular business hours.
9. This proposal is valid for 90 days. Beyond that timeframe our price may be subject to cost escalation. Materials are priced based on copper at \$3.40 /lb.

Exclusions:

1. Utility Company fees.
2. Formed concrete (bollards, pole bases, housekeeping pads, etc.).
3. Sacking of pole bases.
4. Crashcapp.
5. Temporary power and lighting.
6. Grutting, patching, and painting of any kind.
7. Hauling of trenching spoils.
8. Import of water for backfill operation.
9. Trenching requiring equipment larger than Case 680 backhoes.
10. Trenching in caliche, rock or blasting and any de-watering required.
11. Fixture safety and support wires.
12. Conduit and wiring for HVAC controls.
13. Dumpsters for trash.
14. Light fixtures not shown on the electrical drawings.
15. Payment and performance bonds.
16. Site surveying and staking.
17. Trench plates, traffic and pedestrian barriers.
18. Trenching
19. Concrete Encasement

Thank you for the opportunity to submit this proposal.

Sincerely,
HELIIX ELECTRIC

Darron Vanderford
Vice President, Estimating
DV/vr

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New Mexico License #167103 • South Dakota License #EC 2703 • Utah License #7514771-5501 • Wyoming License #C-24040



Nevada State Contractors Board

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License Search Details

Press "Previous Record" to view the previous record in the list.

Press "Next Record" to view the next record in the list.

Press "Search Results" to return to the search results list screen.

Press "New Search Criteria" to revise your existing search criteria or enter new search criteria.

Press "New Search" to select a different search.

License Number:
0053810

Current Date: 12/20/2011 04:30 PM (mm/dd/yyyy)

Business Primary Name: **HELIX ELECTRIC OF NEVADA LLC DBA** License **Unlimited**
 Monetary Limit:

Fictitious Business Name: **HELIX ELECTRIC**

Business Address: **3078 E SUNSET RD STE 9**
LAS VEGAS, NV 89120
(702)732-1188

Phone Number:

Status: **Active**

Status Date: **03/22/2010** (mm/dd/yyyy)

Origin Date: **05/16/2002** (mm/dd/yyyy)

Expiration Date: **05/31/2012** (mm/dd/yyyy)

Business Type: **Limited Liability Company**

Classification(s): **C-2 - ELECTRICAL CONTRACTING**

Principal Name **Relation Description**

FUCHS, VICTOR **Manager Qualified Individual**

JOHNSON, ROBERT DEAN **Employee Qualified Individual**

Bonds

Bond Type: **Surety Bond**

Bond Number: **10370349**

Bond Agent: **STEVENS, LISA D**

Surety Company: **TRAVELERS CASUALTY & SURETY CO OF AMERICA**

Bond Amount: **\$50,000.00**

Effective Date: **05/01/2002** (mm/dd/yyyy)

Disciplinary Actions (during last 5 years)

Date: **04/28/2008** (mm/dd/yyyy)
Discipline Type: **Administrative Citation**
Citation Number: **720**
Number Of Complaints: **1** complaint is associated with this action.
Violation(s): **NRS 624.3011(1)(b) (1)Disregard or violation of building laws**
Action(s): **Fine Assessed**
Investigative Costs Assessed

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Disciplinary Actions During Last 5 Years

Disciplinary Actions Older Than 5 Years

Previous Record

Print Record

Search Results

New Search Criteria

New Search

2011-12-20 4:30:14 PM



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**HELIX ELECTRIC EXHIBIT
TO THE SUBCONTRACT
BETWEEN APCO CONSTRUCTION AND
HELIX ELECTRIC OF NEVADA, LLC DBA HELIX ELECTRIC
FOR CRAIG RANCH REGIONAL PARK – PHASE II
HE JOB #161113**

The following terms will be added to or replace portions of the paragraphs in the Subcontract:

Subcontract Agreement Page 1 of 18	CONTRACT Amount: Delete: \$4,628,025.00 and Replace with: \$2,356,520.00
Contract Documents Page 2 of 18	Section 1, Paragraph 1.3: Revise as follows: add the phrase "... except to the extent a particular obligation of the Subcontractor is set forth in this Subcontract" to the end of the first sentence; add the phrase "... with respect to the Work of this Subcontract" to the end of the second sentence; and delete the third sentence.
Contract Price and Payments Page 3 of 18	Section 4, Paragraph 4.2: Revise to read as follows: "In Consideration of the promises, covenants and agreements of Subcontractor herein contained, and the full, faithful and prompt performance of the work in accordance with the Contract Documents, Contractor agrees to pay, and Subcontractor agrees to receive and accept as full compensation for doing all Work and furnishing all materials and equipment contemplated and embraced in this Subcontract."
Contract Price and Payments Page 3 of 18	Section 4, Paragraph 4.4: Delete (15), Replace with (10 Calendar Days).
Contract Price and Payments Page 4 of 18	Section 4, Paragraph 4.4: Add the following to the end of this section: "Per NRS Statutes."
Contract Price and Payments Page 4 of 18	Section 4, Paragraph 4.6: Revise as follows: Third line delete "...regardless of the source of said obligation." And replace with "...under the provisions of this Subcontract."
Prosecution of Work Page 5 of 18	Section 6: Add the following: "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."
Prosecution of Work Page 5 of 18	Section 6, Paragraph 6.1: Add the following new paragraph: "Contractor shall make available to Subcontractor in a prompt fashion, all information in its possession that affects Subcontractor's ability to meet its obligations under this Subcontract. Information that affects this Subcontract shall include, but not be limited to, information relating to such matters as delays, modifications to the Contractor's agreement with the Owner or other subcontracts that affect the work of the

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FOR CRAIG RANCH REGIONAL PARK – PHASE II
HE JOB #161113**

Subcontractor, impending strikes or work stoppages by any trade and deterioration of the Owner's ability to pay for the Work on the Project."

Prosecution of
Work
Page 5 of 18

Section 6, Paragraph 6.4 Delete in its entirety and replace with following: "6.4 Subcontractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations performed under this Subcontract, and shall regularly haul such waste materials and rubbish to trash receptacles provided by Contractor in convenient locations on the Project's premises. Subcontractor shall not be held responsible for unclean conditions caused by other contractors or subcontractors and shall not be subject to any charge by Contractor for trash removal or cleanup determined on a pro rata or similar basis."

Prosecution of
Work
Page 6 of 18

Section 6, Paragraph 6.6: Revise as follows: add the words "negligent or wrongful acts of the . . ." after the words "delays caused by" in the third line of Paragraph 4.5; then add the following to the end of Paragraph 6.6: "Further, in the event Contractor seeks to assess liquidated or other delay damages against Subcontractor, such an award of liquidated damages shall be assessed against Subcontractor only to the extent caused by Subcontractor, Subcontractor's employees and agents, sub-subcontractors or their agents or employees or other persons performing portions of the work under contract with Subcontractor, or any person or entity for whose acts the Subcontractor may be liable, and in no case for delays or causes arising outside the scope of this Subcontract. Contractor shall not assess liquidated damages against Subcontractor unless and until the Contractor gives written notification of intent and basis of determination of amounts and degree of responsibility Subcontractor and all other subcontractors. Such written notification must be given within a reasonable period of time after the occurrence for which the Contractor seeks to assess liquidated damages, not to exceed ten (10) days after the alleged event causing the damage."

Changes and
Claims
Page 6 of 18

Section 7, Paragraph 7.2: Revise as follows: First line delete "24 hours" and replace with "5 days", add the words "Contractor's written" after the word "of" at the beginning of the second line in Paragraph 7.2; and delete the text of Paragraph 7.2, starting with the words "less reasonable overhead . . ." in the fifth line, through the end of the paragraph.

Changes and
Claims
Page 7 of 18

Section 7, Paragraph 7.4: Delete in its entirety.

Changes and
Claims
Page 7 of 18

Section 7, Add the following new paragraph: "Notwithstanding any other provision of this Subcontract, the parties agree that at no time shall the value of additional labor and materials put in place by Subcontractor at the written direction of Contractor exceed \$15,000.00 without a fully executed, agreed upon change order modifying the Subcontract Price."

Default and
Termination
Page 7 of 18

Section 10, Paragraph 10.4: Delete the second paragraph in its entirety.

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Default and
Termination
Page 9 of 18

Section 10, Add the following new paragraph: "Subcontractor may terminate this Subcontract or its obligations under the Contract Documents, for the same reasons and under the same circumstances and procedures with respect to the Contractor as Contractor may terminate its agreement with respect to the Owner, or for nonpayment of amounts due under this Subcontract for 90 days or longer. In the event of such termination by the Subcontractor for any reason which is not the fault of the Subcontractor, its subcontractors or their agents or employees or other persons performing portions of the Work under contract with Subcontractor, Subcontractor shall be entitled to recover from Contractor payment for work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages, providing Contractor first received payment from Owner."

Indemnity and
Insurance
Page 11 of 18

Section 13, Subparagraph 13.2(a): Revise as follows: delete the phrase "whether or not it is caused in part by an indemnitee; provided, however, that the . . ." from the 11th line of subparagraph 13.2(a), and replace it with the following phrase: "but only to the extent such claims, etc. arise from the negligence or wrongful acts of Subcontractor, and . . ." delete the word "sole" after the words "due the . . ." in the last line of subparagraph 13.2(a), and add the words "or any third party" at the end of the last sentence in this subparagraph.

Indemnity and
Insurance
Page 12 of 18

Section 13, Add the following new paragraph: "Notwithstanding the foregoing, the indemnification obligations of the Subcontractor under this Subcontract shall not extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, authorization for extra work, designs or specifications, or (2) the giving of or failure to give directions or instructions by the Architect, the Architect's consultants, and agents and employees of any of them, provided such giving or failure to give is a proximate cause of the injury or damage."

Damage to
Work
Page 13 of 18

Section 17, Paragraph 17.1: Revise as follows: delete the first sentence of the paragraph (in lines 1-3); delete the words "at all times and at its sole expense . . ." from the third line; delete the words "all work, and . . ." from the fourth line; and add the following to the end of Paragraph 17.1: "Notwithstanding anything contained in this Subcontract to the contrary, once Subcontractor has received final payment for its Work in place, title to same shall pass to Owner and Subcontractor shall no longer be responsible for any damage or loss thereto so long as said damage is not caused by Subcontractor or anyone for whom Subcontractor is contractually responsible, and the Owner shall rely on the project's "all-risk" insurance policy to pay for any loss or damage to Subcontractor's work."

Arbitration
Page 14 of 18

Section 19, Delete Paragraph 19.1, 19.2, 19.4, 19.6, 19.7, and 19.8 and add the following new paragraph 19.1: "The parties agree that active, good faith participation in mediation is a condition precedent to the institution of any formal dispute resolution procedures. The parties shall mutually agree on the person or alternative dispute resolution agency to conduct the mediation. The initiating party shall then undertake to schedule the mediation. If the parties are unable to agree

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CONSTRUCTORS • ENGINEERS

**HELIX ELECTRIC EXHIBIT
TO THE SUBCONTRACT
BETWEEN APCO CONSTRUCTION AND
HELIX ELECTRIC OF NEVADA, LLC DBA HELIX ELECTRIC
FOR CRAIG RANCH REGIONAL PARK -- PHASE II
HE JOB #161113**

on the person or alternative dispute resolution agency to conduct the mediation, the initiating party may contact the Las Vegas, Nevada office of the American Arbitration Association to schedule the conference. The costs of the mediation and fees of the mediator, if any, shall be shared equally by the parties. If a party fails or refuses to participate in the mediation, or if on completion of such mediation the parties are unable to agree and settle the dispute, then the dispute shall be referred to resolution in accordance with the procedures set forth herein. Thus, with the exception of procedures to preserve or enforce mechanic's lien or bond rights, any party that refuses or fails to participate in the mediation, or pay its proportional share of the cost of the mediation, shall be deemed to have waived its right to recover its attorney's fees hereunder, even if said party is later determined by the court or arbitrator to be a prevailing party." Parties will be bound by the Prime Contract.

Arbitration Page 14 of 18	Section 19, Paragraph 19.3: Delete the phrase "arbitration and other" from the first line and add the following paragraph: "This Subcontract and any dispute resolution proceeding brought to enforce or interpret its provisions, shall be governed by the laws of the place where the Project is located."
Miscellaneous Page 14 of 18	Section 20, Paragraph 20.1: Revise as follows: Change the word "Contractor's" in the first line, to the words "either party's" in both places where it appears.
Miscellaneous Page 15 of 18	Section 20, Paragraph 20.7: Revise as following: add the words "and Subcontractor's. . ." after the word "Contractor's . . ." at the beginning of the paragraph, and add the words "and Subcontractor . . ." after the word "Contractor" at the end of the first line.
Exhibit A Page 16 of 18	Subcontractor Scope of work, 2nd and 3rd Lines Delete the following: "...including work reasonably anticipated..."
Exhibit A Page 16 of 18	Subcontractor Scope of Work, 5th and 6th Lines Delete the following: "...including any unforeseen or unseen items, or as described therein..."
Exhibit A Page 16 of 18	Subcontractor Scope of Work, 6th and 7th Lines Delete the following: "No additional Work Authorization (AWA's) or Change Orders's will be issued to Subcontractor unless the General Contractor or Owner revises the scope of work shown on the Contract Documents." Unless Contractor and Subcontractor agree as stated in Section 7 of this Exhibit.
Exhibit A Page 16 of 18	Subcontractor Scope of Work, COMPLETE ELECTRICAL PACKAGE: Delete "4,605,000.00" and Replace with "\$2,356,520;00"
Exhibit A Page 16 of 18	Subcontractor Scope of Work, BONDING: Delete "(.50%)" and Replace with "(1%)"

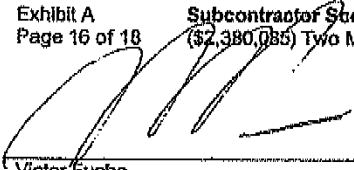


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HE JOB #161113**

Exhibit A
Page 16 of 18

**Subcontractor Scope of Work The Contract Total is, Revise to Read: "The Contract total is
(~~\$2,380,085~~) Two Million Three Hundred Eighty Thousand Eighty Five Dollars and Zero Cents."**



Victor Fuchs
President

APR 04 2012

By: _____
Title: _____
Date: _____



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HE JOB #161113**

The following terms will be added to or replace portions of the paragraphs in the Subcontract:

Subcontract Agreement Page 1 of 18	CONTRACT Amount: Delete: \$4,628,025.00 and Replace with: \$2,356,520.00
Contract Documents Page 2 of 18	Section 1, Paragraph 1.3: Revise as follows: add the phrase "... except to the extent a particular obligation of the Subcontractor is set forth in this Subcontract" to the end of the first sentence; add the phrase "... with respect to the Work of this Subcontract" to the end of the second sentence; and delete the third sentence.
Contract Price and Payments Page 3 of 18	Section 4, Paragraph 4.2: Revise to read as follows: "In Consideration of the promises, covenants and agreements of Subcontractor herein contained, and the full, faithful and prompt performance of the work in accordance with the Contract Documents, Contractor agrees to pay, and Subcontractor agrees to receive and accept as full compensation for doing all Work and furnishing all materials and equipment contemplated and embraced in this Subcontract."
Contract Price and Payments Page 3 of 18	Section 4, Paragraph 4.4: Delete (15), Replace with (10 Calendar Days).
Contract Price and Payments Page 4 of 18	Section 4, Paragraph 4.4: Add the following to the end of this section: "Per NRS Statutes."
Contract Price and Payments Page 4 of 18	Section 4, Paragraph 4.6: Revise as follows: Third line delete "... regardless of the source of said obligation." And replace with "... under the provisions of this Subcontract."
Prosecution of Work Page 5 of 18	Section 6: Add the following: "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."
Prosecution of Work Page 5 of 18	Section 6, Paragraph 6.1: Add the following new paragraph: "Contractor shall make available to Subcontractor in a prompt fashion, all information in its possession that affects Subcontractor's ability to meet its obligations under this Subcontract. Information that affects this Subcontract shall include, but not be limited to, information relating to such matters as delays, modifications to the Contractor's agreement with the Owner or other subcontracts that affect the work of the

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Subcontractor, impending strikes or work stoppages by any trade and deterioration of the Owner's ability to pay for the Work on the Project."

Prosecution of
Work
Page 5 of 18

Section 6, Paragraph 6.4 Delete in its entirety and replace with following: "6.4 Subcontractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations performed under this Subcontract, and shall regularly haul such waste materials and rubbish to trash receptacles provided by Contractor in convenient locations on the Project's premises. Subcontractor shall not be held responsible for unclean conditions caused by other contractors or subcontractors and shall not be subject to any charge by Contractor for trash removal or cleanup determined on a pro rata or similar basis."

Prosecution of
Work
Page 6 of 18

Section 6, Paragraph 6.6: Revise as follows: add the words "negligent or wrongful acts of the Contractor" after the words "delays caused by" in the third line of Paragraph 6.6; then add the following to the end of Paragraph 6.6: "Further, in the event Contractor seeks to assess liquidated or other delay damages against Subcontractor, such an award of liquidated damages shall be assessed against Subcontractor only to the extent caused by Subcontractor, Subcontractor's employees and agents, sub-subcontractors or their agents or employees or other persons performing portions of the work under contract with Subcontractor, or any person or entity for whose acts the Subcontractor may be liable, and in no case for delays or causes arising outside the scope of this Subcontract. Contractor shall not assess liquidated damages against Subcontractor unless and until the Contractor gives written notification of intent and basis of determination of amounts and degree of responsibility Subcontractor and all other subcontractors. Such written notification must be given within a reasonable period of time after the occurrence for which the Contractor seeks to assess liquidated damages, not to exceed ten (10) days after the alleged event causing the damage."

Changes and
Claims
Page 6 of 18

Section 7, Paragraph 7.2: Revise as follows: First line delete "24 hours" and replace with "5 days", add the words "Contractor's written" after the word "of" at the beginning of the second line in Paragraph 7.2; and delete the text of Paragraph 7.2, starting with the words "less reasonable overhead..." in the fifth line, through the end of the paragraph.

Changes and
Claims
Page 7 of 18

Section 7, Paragraph 7.4: Delete in its entirety.

Changes and
Claims
Page 7 of 18

Section 7, Add the following new paragraph: "Notwithstanding any other provision of this Subcontract, the parties agree that at no time shall the value of additional labor and materials put in place by Subcontractor at the written direction of Contractor exceed \$15,000.00 without a fully executed, agreed upon change order modifying the Subcontract Price."

Default and
Termination
Page 7 of 18

Section 10, Paragraph 10.4: Delete the second paragraph in its entirety.

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Default and
Termination
Page 9 of 18

Section 10. Add the following new paragraph: "Subcontractor may terminate this Subcontract or its obligations under the Contract Documents, for the same reasons and under the same circumstances and procedures with respect to the Contractor as Contractor may terminate its agreement with respect to the Owner, or for nonpayment of amounts due under this Subcontract, for 90 days or longer. In the event of such termination by the Subcontractor for any reason which is not the fault of the Subcontractor, its subcontractors or their agents or employees or other persons performing portions of the Work under contract with Subcontractor, Subcontractor shall be entitled to recover from Contractor payment for work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages, providing Contractor first received payment from Owner."

Indemnity and
Insurance
Page 11 of 18

Section 13. Subparagraph 13.2(a): Revise as follows: delete the phrase "whether or not it is caused in part by an Indemnitee; provided, however, that the . . ." from the 11th line of subparagraph 13.2(a), and replace it with the following phrase: "but only to the extent such claims, etc. arise from the negligence or wrongful acts of Subcontractor, and . . ." delete the word "sole" after the words "due the . . ." in the last line of subparagraph 13.2(a), and add the words "or any third party" at the end of the last sentence in this subparagraph.

Indemnity and
Insurance
Page 12 of 18

Section 13. Add the following new paragraph: "Notwithstanding the foregoing, the indemnification obligations of the Subcontractor under this Subcontract shall not extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them, arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, authorization for extra work, designs or specifications, or (2) the giving of or failure to give directions or instructions by the Architect, the Architect's consultants, and agents and employees of any of them, provided such giving or failure to give is a proximate cause of the injury or damage."

Damage to
Work
Page 13 of 18

Section 17. Paragraph 17.1: Revise as follows: delete the first sentence of the paragraph (in lines 1-3); delete the words "at all times and at its sole expense . . ." from the third line; delete the words "all work, and . . ." from the fourth line; and add the following to the end of Paragraph 17.1: "Notwithstanding anything contained in this Subcontract to the contrary, once Subcontractor has received final payment for its Work in place, title to same shall pass to Owner and Subcontractor shall no longer be responsible for any damage or loss thereto so long as said damage is not caused by Subcontractor or anyone for whom Subcontractor is contractually responsible, and the Owner shall rely on the project's "all-risk" insurance policy to pay for any loss or damage to Subcontractor's work."

Arbitration
Page 14 of 18

Section 19. Delete Paragraph 19.1, 19.2, 19.4, 19.6, 19.7, and 19.8 and add the following new paragraph 19.1: "The parties agree that active, good faith participation in mediation is a condition precedent to the institution of any formal dispute resolution procedures. The parties shall mutually agree on the person or alternative dispute resolution agency to conduct the mediation. The initiating party shall then undertake to schedule the mediation. If the parties are unable to agree

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on the person or alternative dispute resolution agency to conduct the mediation, the initiating party may contact the Las Vegas, Nevada office of the American Arbitration Association to schedule the conference. The costs of the mediation and fees of the mediator, if any, shall be shared equally by the parties. If a party fails or refuses to participate in the mediation, or if on completion of such mediation the parties are unable to agree and settle the dispute, then the dispute shall be referred to resolution in accordance with the procedures set forth herein. Thus, with the exception of procedures to preserve or enforce mechanic's lien or bond rights, any party that refuses or fails to participate in the mediation, or pay its proportional share of the cost of the mediation, shall be deemed to have waived its right to recover its attorney's fees hereunder, even if said party is later determined by the court or arbitrator to be a prevailing party. Parties will be bound by the Prime Contract.

Arbitration Page 14 of 18	Section 19, Paragraph 19.3: Delete the phrase "arbitration and other" from the first line and add the following paragraph: "This Subcontract and any dispute resolution proceeding brought to enforce or interpret its provisions, shall be governed by the laws of the place where the Project is located."
Miscellaneous Page 14 of 18	Section 20, Paragraph 20.1: Revise as follows: Change the word "Contractor's" in the first line, to the words "either party's" in both places where it appears.
Miscellaneous Page 15 of 18	Section 20, Paragraph 20.7: Revise as following: add the words "and Subcontractor's, . ." after the word "Contractor's, . ." at the beginning of the paragraph, and add the words "and Subcontractor, . ." after the word "Contractor" at the end of the first line.
Exhibit A Page 16 of 18	Subcontractor Scope of work, 2nd and 3rd Lines Delete the following: "...including work reasonably anticipated..."
Exhibit A Page 16 of 18	Subcontractor Scope of Work, 5th and 6th Lines Delete the following: "...including any unforeseen or unseen items, or as described therein..."
Exhibit A Page 16 of 18	Subcontractor Scope of Work, 6th and 7th Lines Delete the following: "No additional Work Authorization (AWA's) or Change Orders's will be issued to Subcontractor unless the General Contractor or Owner revises the scope of work shown on the Contract Documents." Unless Contractor and Subcontractor agree as stated in Section 7 of this Exhibit.
Exhibit A Page 16 of 18	Subcontractor Scope of Work, COMPLETE ELECTRICAL PACKAGE: Delete "4,605,000.00" and Replace with "\$2,356,520.00"
Exhibit A Page 16 of 18	Subcontractor Scope of Work, BONDING: Delete "(50%)" and Replace with "(1%)"

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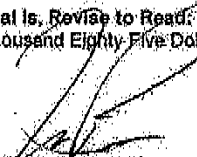
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FOR CRAIG RANCH REGIONAL PARK – PHASE II
HE JOB #161113**

Exhibit A
Page 16 of 18

Subcontractor Scope of Work The Contract Total Is, Revise to Read: "The Contract total is
(\$2,380,085) Two Million Three Hundred Eighty Thousand Eighty Five Dollars and Zero Cents."


Victor Fuchs
President

APR 04 2012


By: DOUG PELAN
Title: Contract Manager
Date: 4/17/12

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JA236

EXHIBIT “2”



Helix Electric

CONSTRUCTORS • ENGINEERS

Janaury 28, 2013

Brian Bohn
Apco Construction
3432 N. 5th Street
North Las Vegas, Nevada 89032

Regarding: **Schedule delay/Extended overhead**
Craig Ranch Park Phase II

Dear Brian:

The original scheduled final completion date was January 9, 2013 for the above referenced project. The current scheduled completion date that Apco Construction has transmitted shows a current schedule completion date of August 3, 2013. Please accept this notice that Helix Electric reserves all rights to any and all additional cost incurred due to scheduled delays for this project.

Should you disagree with any of the above information, please notify Helix Electric in writing within the next 48 hours.

Please do not hesitate to call me if you have any questions.

Sincerely,

Kurk Williams
Project Manager

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EXHIBIT “3”



Helix Electric

CONSTRUCTORS • ENGINEERS

June 19, 2013

Brian Bohn
Apco Construction
3432 N. 5th Street
North Las Vegas, Nevada 89032

Regarding: **Extended overhead Cost**
Craig Ranch Park Phase II

Dear Brian:

This letter is a follow up to our Notice letter of Schedule delay/Extended overhead dated January 28, 2013. Based on the original scheduled final completion date of January 9, 2013 for the above referenced project Helix Electric is incurring daily cost of extended overhead. Below is our daily cost associated to this extended overhead.

<i>Project Manager</i>	<i>\$260</i>
<i>Superintendent</i>	<i>\$280</i>
<i>Site Trailer</i>	<i>\$25</i>
<i>Connex</i>	<i>\$5</i>
<i>Forklift</i>	<i>\$25</i>
<i>Truck</i>	<i>\$45</i>

Please be advised that Helix will be pursuing payment for the cost as the project continues to run beyond the original bid documents schedule and the contract schedule.

Please do not hesitate to call me if you have any questions.

Sincerely,

Kirk Williams
Project Manager

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EXHIBIT “4”



Helix Electric
CONSTRUCTORS - ENGINEERS

MISCELLANEOUS INVOICE # 161113M-001

APCO Construction
44 W Mayflower
North Las Vegas, NV 89030
ATTN: Joe Polan

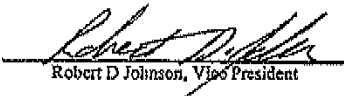
INVOICE DATE: August 27, 2013
THRU DATE:
SUBCONTRACT:

PROJECT NAME: Craig Ranch Regional Park
Phase II

DESCRIPTION: Extended Overhead

Extended Overhead - \$640/day - \$3,200/week for 32 weeks \$ 102,400.00

Total Amount Due \$ 102,400.00


Robert D. Johnson, Vice President

Due and Payable within ten (10) days of receipt of invoice.

Pursuant to NRS code section 7188.5 a penalty of 2% per month of the amount owed, plus attorney's fees if required for collection, shall be assessed to this invoice for payments not received within 10 days of receipt of progress payments from owner.

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Nevada Contractor's License No. 0053810

EXHIBIT “5”

APCO Construction**CHANGE ORDER REQUEST**

No. 00068

44 W. Mayflower
North Las Vegas, NEVADA 89030Phone: 702-734-0198
Fax: 702-734-0396**TITLE:** HELIX ELECTRIC - EXTENDED OVERHEAD**DATE:** 8/28/2013**PROJECT:** Craig Ranch Regional Park - Phase 2**JOB:** 0193**TO:** Attn: Joemel Llamado
City of North Las Vegas
Phone: 702-633-1230**CONTRACT NO:** 1**RE: To: From: Number:**

Item	Description	Stock#	Quantity	Units	Unit Price	Tax Rate	Tax Amount	Net Amount
00001	HELIX ELECTRIC - EXTENDED OVERHEAD		33,000	W86KS	\$3,200.00	0.00%	\$0.00	\$102,400.00

Unit Cost: \$102,400.00**Unit Tax:** 50.00**Total:** \$102,400.00**APPROVAL:****By:** _____
Joemel Llamado**By:** _____
Joe Pelan**Date:** _____**Date:** 9/5/13

Expedition 50

EXHIBIT “6”

City of North Las Vegas

Engineering Services Division
2250 N Las Vegas Boulevard, Ste 610
North Las Vegas, NV 89030

Phone: 633-1230
Fax: 642-0390

CHANGE MANAGEMENT**NO: 00068****PROJECT:** Craig Ranch Regional Park Phase 2 **JOB:** 1398**TITLE:** Helix Electric - Extended Overhead **CHANGE ISSUE:****REASON CODE:** **SCOPE:** Out of Scope**ACTIVITY ID:** **STATUS:** REJ**Current Status:**

	Estimated	Quoted	Negotiated	Final
Budgeted:	\$0.00	\$0.00	\$0.00	\$0.00
Committed:				

Budget Contract Summary:

Original Contract Sum: \$28,512,054.00

Approved Changes: \$0.00

Revised Contract Sum: \$28,512,054.00

Current Change Value: \$0.00

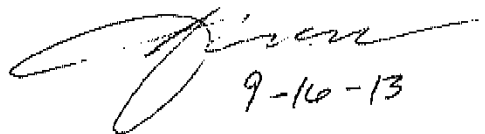
Contract Sum if Approved at this Value: \$28,512,054.00

Budget:

Contract/PO Type :CON	No: 1	To: APCO	BE	From: CNLV	JDL
	Estimated	Quoted	Negotiated	Final	
Time Change:	0	0	0	0	
Values:	\$0.00	\$0.00	\$0.00	\$0.00	

Commitments:**Remarks:**

This CO is REJECTED. This City of North Las Vegas does not have a contract with Helix Electric.


9-16-13

Joemel Llamado
CITY OF NORTH LAS VEGAS
CONSTRUCTION MGR.

EXHIBIT “7”



Oct. 8. 2013 10:29AM APCO Construction

No. 2030 P. 1



October 3, 2013

VIA FACSIMILE ONLY: (702)732-4386

Mr. Bob Johnson
Helix Electric
3078 E. Sunset Road, Ste. 9
Las Vegas, NV 89120

RE: Craig Ranch Project
Helix Electric - Extended Overhead

Dear Mr. Johnson:

Attached is your invoice of August 27, 2013 in the amount of \$102,400. At this time APCO has not received any back-up documentation to undo the previous formal rejection made by the City of North Las Vegas.

If you want APCO to re-submit your request, please provide the appropriate back-up for review.

Yours truly,

Joe Pelan
Contract Manager
APCO CONSTRUCTION

EXHIBIT “8”



Helix Electric
CONSTRUCTORS • ENGINEERS

October 31, 2013

VIA EMAIL ONLY: jpelan@apcoconstruction.com

Joe Pelan
Apco Construction
44 W. mayflower Ave.
North Las Vegas, Nevada 89030

Regarding: Rejected invoice 161113M-001
Craig Ranch Park Phase II

Dear Mr. Pelan:

Attached please find the requested back-up documentation requested to support our invoice 161113M-001. Please note that after additional review of our extended overhead for the dates of January 13, 2013 - August 30, 2013, we found that our calculated extended overhead was actually \$111,847 and not \$102,400 that we originally requested. We will be submitting a revised invoice in the amount of \$111,847.

In addition we will be submitting a separate invoice for extended overhead for the dates of September 2, 2013 - October 25, 2013.

Please do not hesitate to call me if you have any questions.

Sincerely,

Kirk Williams
Project Manager

3075 E. Sunset Rd., Suite 2 • Las Vegas, NV 89120 • Tel: (702) 732-1188 Fax: (702) 732-1494
Nevada License #0058810 • #0073392 • #0073455
Arizona License #RQ0252191 K-11 • Utah License #7814771-5501



Helix Electric
CONSTRUCTORS - ELECTRICAL

MISCELLANEOUS INVOICE # 161113M-001R1

APCO Construction
44 W Mayflower
North Las Vegas, NV 89030
ATTN: Joe Pelen

INVOICE DATE: August 27, 2013
THRU DATE:
SUBCONTRACT:

PROJECT NAME: Craig Ranch Regional Park
Phase II

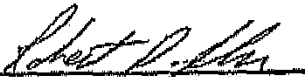
DESCRIPTION: Extended Overhead

Extended Overhead - See Attached

\$ 111,847.00

Total Amount Due

\$ 111,847.00


Robert D. Johnson, Vice President

Due and Payable within ten (10) days of receipt of invoice.

Pursuant to B&B code section 7108.5 a penalty of 2% per month of the amount owed, plus attorney's fees if required for collection, shall be assessed to this invoice for payments not received within 10 days of receipt of progress payments from owner.

3078 E. Sunset Road, Suite 9, Las Vegas, NV 89120 Tel: (702) 732-1188 Fax: (702) 732-4386
Nevada Contractor's License No. 0053810

	January	February	March	April	May	June	July	August
Project Manager	\$ 2,600.00	\$ 5,200.00	\$ 5,200.00	\$ 5,200.00	\$ 6,500.00	\$ 5,200.00	\$ 6,500.00	\$ 5,200.00
Project Engineer		\$ 901.90	\$ 901.90	\$ 901.90	\$ 901.90	\$ 901.90	\$ 901.90	\$ 901.90
Superintendent	\$ 2,800.00	\$ 5,600.00	\$ 5,600.00	\$ 5,600.00	\$ 7,000.00	\$ 5,600.00	\$ 7,000.00	\$ 5,600.00
Site Truck/s	\$ 302.50	\$ 505.00	\$ 440.00	\$ 440.00	\$ 165.00	\$ 165.00	\$ 165.00	\$ 165.00
Project Fuel	\$ 457.14	\$ 1,239.11	\$ 680.66	\$ 603.70	\$ 256.19	\$ 353.32	\$ 373.73	\$ 298.14
Site Trailer	\$ 110.00	\$ 220.00	\$ 220.00	\$ 220.00	\$ 220.00	\$ 220.00	\$ 220.00	\$ 220.00
Wire Trailer/s	\$ 55.00	\$ 110.00	\$ 110.00	\$ 110.00	\$ 55.00			
Office Supplies								
Storage Containers	\$ 110.00	\$ 220.00	\$ 110.00	\$ 110.00	\$ 110.00	\$ 110.00	\$ 110.00	
Formulas		\$ 3,329.48	\$ 3,425.32					
Small Tools	\$ 379.02	\$ 695.09	\$ 501.40	\$ 414.16	\$ 292.96	\$ 174.77	\$ 214.52	\$ 166.83
Consumables								
Total	\$ 6,813.66	\$ 17,980.58	\$ 17,196.28	\$ 18,599.76	\$ 15,501.05	\$ 12,724.99	\$ 15,485.21	\$ 12,351.87

\$11,847

Grand total for extended overhead for months January 21, 2013 - August 30, 2013
Project Manager Based on 4 Hours a Day @ \$85/Hr.
Superintendent @ 4 Hours a Day \$10/Hr.

EXHIBIT “9”

APCO Construction44 W. Mayflower
North Las Vegas, NEVADA 89030Phone: 702-734-0198
Fax: 702-734-0396**CHANGE ORDER REQUEST**

No. 00068.1

TITLE: HELIX ELECTRIC - EXTENDED OVERHEAD**DATE:** 11/5/2013**PROJECT:** Craig Ranch Regional Park - Phase 2**JOB:** 0193**TO:** Attn: Joemel Llamado
City of North Las Vegas
Phone: 702-633-1230**CONTRACT NO:** 1**RE: To: From: Number:**

Item	Description	Stock#	Quantity	Units	Unit Price	Tax Rate	Tax Amount	Net Amount
00001	HELIX ELECTRIC - EXTENDED OVERHEAD (1/13/13 - 8/30/13)		1.000		\$111,847.00	0.00%	\$0.00	\$111,847.00

Unit Cost: \$111,847.00**Unit Tax:** \$0.00**Total:** \$111,847.00**APPROVAL:****By:** _____
Joemel Llamado**Date:** _____

Expedition 00

By: _____
Joe Pelan**Date:** 11/6/13

EXHIBIT “10”

City of North Las Vegas

Engineering Services Division
2250 N Las Vegas Boulevard, Ste 610
North Las Vegas, NV 89030

Phone: 633-1230
Fax: 642-0390

CHANGE MANAGEMENT**NO: 00068.1****PROJECT:** Craig Ranch Regional Park Phase 2 **JOB:** 1398**TITLE:** Helix Electric Ext. Overhead 2 **CHANGE ISSUE:****REASON CODE:** **SCOPE:** Out of Scope**ACTIVITY ID:** **STATUS:** REJ**Current Status:**

	Estimated	Quoted	Negotiated	Final
Budgeted:	\$0.00	\$0.00	\$0.00	\$0.00
Committed:				

Budget Contract Summary:**Original Contract Sum:** \$28,512,054.00**Approved Changes:** \$0.00**Revised Contract Sum:** \$28,512,054.00**Current Change Value:** \$0.00**Contract Sum if Approved at this Value:** \$28,512,054.00**Budget:**

Contract/PO Type :	CON	No:	1	To: APCO	BE	From: CNLV	JDL
		Estimated	Quoted	Negotiated	Final		
Time Change:		0	0	0	0		
Values:		\$0.00	\$0.00	\$0.00	\$0.00		

Commitments:**Remarks:**

This is the 2nd COR for Helix Electric's extended overhead submittal. The 1st one was submitted on Sept. 9, 2013 and Rejected on Sept. 16, 2013. This submittal dated Nov. 5, 2013 is **REJECTED** on Nov. 13, 2013.


 11/10/13
REJECTED

EXHIBIT “11”



Helix Electric
CONSTRUCTORS • INSURANCE

MISCELLANEOUS INVOICE # 161113M-002

APCO Construction
44 W Mayflower
North Las Vegas, NV 89030
ATTN: Joe Pelan

INVOICE DATE: November 13, 2013
THRU DATE:
SUBCONTRACT:

PROJECT NAME: Craig Ranch Regional Park
Phase II

DESCRIPTION: Extended Overhead

Extended Overhead - See Attached \$ 26,304.00

Total Amount Due \$ 26,304.00


Robert D. Johnson, Vice President

Due and Payable within ten (10) days of receipt of invoice.

Pursuant to B&P code section 7108.5 a penalty of 2% per month of the amount owed, plus attorney's fees if required for collection, shall be assessed to this invoice for payments not received within 10 days of receipt of progress payments from owner.

3078 E. Sunset Road, Suite 9, Las Vegas, NV 89120 Tel: (702) 732-1188 Fax: (702) 732-4386
Nevada Contractor's License No. 0053810

	September	October							
Project Manager	\$ 5,200.00	\$ 6,500.00							
Project Engineer	\$ 512.12	\$ 640.15							
Superintendent	\$ 5,600.00	\$ 7,000.00							
Site Truck/s	\$ 165.00								
Project Fuel	\$ 293.44								
Site Trailer									
Wine Trailer/s									
Office Supplies									
Storage Conex/ies									
Forklift/s									
Small Tools	\$ 174.77	\$ 218.52							
Consumables									
Total	\$ 11,945.33	\$ 14,358.67	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -

Grand total for extended overhead for months September 2013 - October 2013 \$ 26,304.00
Project Manager Based on 4 Hours a Day @ \$65/Hr.
Superintendent @ 4 Hours a Day \$70/Hr.

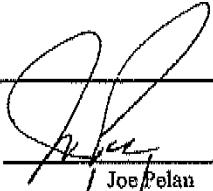
EXHIBIT “12”

APCO Construction**CHANGE ORDER REQUEST**

No. 00093

44 W. Mayflower
North Las Vegas, NEVADA 89030Phone: 702-734-0198
Fax: 702-734-0396**TITLE:** HELIX ELECTRIC-EXT.GC'S Sept.-Oct**DATE:** 11/18/2013**PROJECT:** Craig Ranch Regional Park - Phase 2**JOB:** 0193**TO:** Attn: Joemel Llamado
City of North Las Vegas
Phone: 702-633-1230**CONTRACT NO:** 1**RE:****To:****From:****Number:**

Item	Description	Stock#	Quantity	Units	Unit Price	Tax Rate	Tax Amount	Net Amount
00001	HELIX ELECTRIC - EXTENDED OVERHEAD (9/1/2013 - 10/25/13)		1.000		\$26,304.00	0.00%	\$0.00	\$26,304.00

Unit Cost: \$26,304.00**Unit Tax:** \$0.00**Total:** \$26,304.00**APPROVAL:****By:** _____
Joemel Llamado**Date:** _____**By:**  _____
Joe Pelan**Date:** 11/18/13

Expedition 8

EXHIBIT “13”

City of North Las Vegas

Engineering Services Division
2250 N Las Vegas Boulevard, Ste 610
North Las Vegas, NV 89030

Phone: 633-1230
Fax: 642-0390

CHANGE MANAGEMENT**NO: 00093****PROJECT:** Craig Ranch Regional Park Phase 2 **JOB:** 1398**TITLE:** Helix Electric Extended GC's **CHANGE ISSUE:****REASON CODE:** **SCOPE:** Out of Scope**ACTIVITY ID:** **STATUS:** RBJ**Current Status:**

	Estimated	Quoted	Negotiated	Final
Budgeted:	\$0.00	\$0.00	\$0.00	\$0.00
Committed:				

Budget Contract Summary:**Original Contract Sum:** \$28,512,054.00**Approved Changes:** \$0.00**Revised Contract Sum:** \$28,512,054.00**Current Change Value:** \$0.00**Contract Sum if Approved at this Value:** \$28,512,054.00**Budget:**

Contract/PO Type : CON	No: 1	To: APCO	BE	From: CNLV	IDL
	Estimated	Quoted	Negotiated	Final	
Time Change:	0	0	0	0	
Values:	\$0.00	\$0.00	\$0.00	\$0.00	

Commitments:**Remarks:**

This COR in the amount of \$26,304.00 for Helix Electric Extended GC's is REJECTED on 12/4/13.

EXHIBIT “14”



HELIX ELECTRIC
CONSTRUCTORS • ENGINEERS

September 26, 2014

Joe Pelan
Apco Construction
44 W Mayflower Avenue
N. Las Vegas, NV 89030

Sent via fax to (702) 734-0396
Sent via email to jpelan@apcoconstruction.com
Sent via certified, return receipt mail (USPS)

Re: Demand for Payment Craig Ranch project

Dear Joe,

Please accept this letter as a formal demand for a final payment including claim for general conditions in the amount of \$243,828. Numerous attempts on the part of Helix Electric have been made to collect the past due outstanding amounts; however, at this point we have exhausted our efforts.

If we don't hear from you within 48 hours on how you intend to rectify this matter, we will have no choice but turn this over to our legal counsel for collection. Any costs that result from this action will be passed to your account once they are available.

We regret having to resort to this action but we see no other avenue to collect the money that is way past due.

Sincerely,

Victor Fuchs
President

VF:kmc

cc: Bob Johnson, Helix Electric
Kurk Williams, Helix Electric
Theodore Parker, Parker Nelson & Associates

3078 E. Sunset Rd., Suite 9 • Las Vegas, NV 89120 • Tel: (702) 732-1188 Fax: (702) 732-4386
Nevada License #0053810 • 0073392 • 0073455 • Arizona License #ROC 232191 K-11 • California License #999859 • Idaho License #005985
Minnesota License #EA649828 • Montana License #2412 • North Dakota License #3134 • New Mexico License #387103
South Dakota License #EC2703 • Texas License #30109 • Utah License #7314771-6501 6200 • Wyoming License #C-24040

EXHIBIT “15”



Helix Electric
CONSTRUCTORS • ENGINEERS

October 30, 2014

Joe Polan
APCO Construction
44 W Mayflower Avenue
North Las Vegas, NV 89030

Regarding: **Craig Ranch Regional Park Phase 2**

Regarding: **10/29/2014 Unconditional Waiver and Release Upon Final Payment**

Dear Joe:

We are providing this letter to reserve our rights for payment related to \$138,151.00 in costs for extended general conditions on the Craig Ranch Regional Park Phase 2 project.

This letter and the \$138,151.00 in costs has been incorporated into the "Amount of Disputed Claims" on our 10/29/2014 Unconditional Waiver and Release Upon final payment for this project.

Sincerely,

Robert D. Johnson
SR VP Major Projects

3078 E. Sunset Rd., Suite 9 • Las Vegas, NV 89120 • Tel: (702) 732-1188 Fax: (702) 737-7494
Nevada License #0053810 • #0073392 • #0073453
Arizona License #ROC232191 K-11 • Utah License #7314771-5501



Helix Electric
CONSTRUCTORS - ENGINEERS

MISCELLANEOUS INVOICE # 161113M-001R2

APCO Construction
44 W Mayflower
North Las Vegas, NV 89030
ATTN: Joe Pelan

INVOICE DATE: August 27, 2013
THRU DATE:
SUBCONTRACT:

PROJECT NAME: Craig Ranch Regional Park
Phase II

DESCRIPTION: Extended Overhead

Extended Overhead - See Attached

\$ 138,151.00

Total Amount Due

\$ 138,151.00

This invoice supersedes the previous invoices.


Robert D. Johnson, Vice President

Due and Payable within ten (10) days of receipt of invoice.

Pursuant to B&P code section 7108.5 a penalty of 2% per month of the amount owed, plus attorney's fees if required for collection, shall be assessed to this invoice for payments not received within 10 days of receipt of progress payments from owner.

3078 E. Sunset Road, Suite 9, Las Vegas, NV 89120 Tel: (702) 732-1188 Fax: (702) 732-4386
Nevada Contractor's License No. 0053810

JA268



UNCONDITIONAL WAIVER AND RELEASE
UPON FINAL PAYMENT

Property Name:	Craig Ranch Regional Park Phase 2
Property Location:	628 W. Craig Road, North Las Vegas, NV 89032
Undersigned's Customer:	APCO Construction
Inv./Pmt Application No:	FINAL PAYMENT
Payment Amount:	\$105,679.00
Amount of Disputed Claims:	\$138,151.00 (attached pages are made a part of this release)

The undersigned has been paid in full for all work, materials and equipment furnished to his Customer for the above described Property and does hereby waive and release any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property, except for the payment of Disputed Claims, if any, noted above. The undersigned warrants that he either has already paid or will use the money received from the final payment promptly to pay in full all laborers, subcontractors, material men and suppliers for all work, materials or equipment that are the subject of the waiver and release.

Dated: 10/29/2014

Helix Electric of Nevada, LLC

By:

Its:

Robert D Johnson, Senior Vice President

Notice: This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it, even if you have not been paid. If you have not been paid, use a Conditional Release form.

EXHIBIT “16”

From: Victor Fuchs <vfuchs@helixelectric.com>
Sent: Monday, December 14, 2015 7:04 PM
To: Richard Peel
Subject: FW: Promissory Note

Please call mer on this

Victor Fuchs
President
Helix Electric

3078 E. Sunset Rd. Suite 9
Las Vegas NV 89120
vfuchs@helixelectric.com
Main Phone (702)732-1188
Direct Line(702)697-8203
Fax (702)699-5743



HELIX ELECTRIC
CONSTRUCTORS • ENGINEERS

2014 ABC Excellence in Construction Eagle Award Winner
2013 ABC Excellence in Construction Eagle Award Winner
2012 ABC Excellence in Construction Eagle Award Winner
2011 ABC Excellence in Construction Eagle Award Winner
2010 ABC Excellence in Construction Eagle Award Winner

From: Joe Pelan [mailto:jpelan@apcoconstruction.com]
Sent: Friday, January 16, 2015 2:52 PM
To: Victor Fuchs
Subject: RE: Promissory Note

Victor, I received your email and understand your position. Have a good weekend.

From: Victor Fuchs [mailto:vfuchs@helixelectric.com]
Sent: Tuesday, January 13, 2015 11:52 AM
To: Joe Pelan
Cc: Kathi McCain
Subject: FW: Promissory Note
Importance: High

Joe,

Please accept this email as a 30 day extension of time for the execution of promissory note attached..

In good faith we are extending this time per your request, so you can come up with an arrangement to repay the outstanding amount that is past due.

If we don't hear from you within 30 days we expect you to either sign an attached agreement without any exception or have a plan of repayment that is acceptable to Helix Electric.

Please confirm in writing that you accept these terms by the end of business day tomorrow.

If we don't hear from you by the end of business day tomorrow Jan 14th, we will have no choice to turn this matter over to our legal to collect the outstanding amounts that are due.

Sincerely,

Victor Fuchs
President
Helix Electric

3078 E. Sunset Rd. Suite 9
Las Vegas NV 89120
vfuchs@helixelectric.com
Main Phone (702)732-1188
Direct Line (702)697-8203
Fax (702)699-5743



2013 ABC Excellence in Construction Eagle Award Winner
2012 ABC Excellence in Construction Eagle Award Winner
2011 ABC Excellence in Construction Eagle Award Winner
2010 ABC Excellence in Construction Eagle Award Winner

From: Kathi McCain
Sent: Tuesday, January 13, 2015 9:16 AM
To: Victor Fuchs
Subject: FW: Promissory Note

Do I need to do anything further with this?



Kathi McCain, Executive Assistant to
Victor Fuchs, President
Helix Electric
3078 E. Sunset Road, Suite 9

Las Vegas, NV 89120
T: (702) 732-1188
F: (702) 699-5743

From: Kathi McCain
Sent: Monday, December 15, 2014 5:27 PM
To: Victor Fuchs
Subject: FW: Promissory Note

I'm not sure when this is due now.



Kathi McCain, Executive Assistant to
Victor Fuchs, President
Helix Electric
3078 E. Sunset Road, Suite 9
Las Vegas, NV 89120
T: (702) 732-1188
F: (702) 699-5743

From: Kathi McCain
Sent: Wednesday, December 10, 2014 5:50 PM
To: 'jpelan@apcoconstruction.com'
Cc: Victor Fuchs
Subject: Promissory Note

Good evening, Joe.

Victor asked that I forward this promissory note to you for execution.

Thank you.



Kathi McCain, Executive Assistant to
Victor Fuchs, President
Helix Electric
3078 E. Sunset Road, Suite 9
Las Vegas, NV 89120
T: (702) 732-1188
F: (702) 699-5743

PROMISSORY NOTE

Las Vegas, Nevada

\$138,151.00

Dated November 13, 2014

FOR VALUE RECEIVED, APCO CONSTRUCTION (the "Maker"), promises to pay to the order of HELIX ELECTRIC OF NEVADA, LLC, a Nevada limited liability company (the "Holder" or "Helix"), the principal sum of One Hundred Thirty Eight Thousand One Hundred Fifty One and No/100 Dollars (\$138,151.00 – the "Principal Sum") on the following terms and conditions:

Payment. The Principal Sum shall be payable in three (3) payments as follows: \$20,000.00 due on or before November 21, 2014; \$59,076.00 due on or before November 21, 2015; and \$59,075.00 due on or before November 21, 2016. The principal balance of this Note may be prepaid, in whole or in part, at any time and from time to time, without premium or penalty. The payment of the Principal Sum shall be made to the Holder at the following address: 3078 East Sunset Road, Suite 9, Las Vegas, Nevada 89120, or at such other place as Holder may designate, in immediately available funds in US Dollars.

Security Interest. To secure the duties and obligations under this Note, Maker hereby assigns and grants to Holder, as a secured party, a continuing lien on and security interest in any and all assets currently owned or hereinafter to be acquired by Maker (the "Collateral"), which shall include without limitation, (i) all tangible personal property, fixtures, leasehold improvements, trade fixtures, equipment and other personal property and (ii) all general intangibles and quasi-tangibles, along with all proceeds or products (including insurance proceeds) thereof, all additions and accessions thereto, and all substitutions and replacements therefor. Maker, as a debtor, irrevocably authorizes Holder at any time and from time to time to file in any Uniform Commercial Code ("UCC") jurisdiction any initial financing statements and amendments thereto that (i) indicate the Collateral (a) as all assets of Maker or words of similar effect, regardless of whether any particular asset comprised in the Collateral falls within the scope of Article 9 of the Nevada UCC or any other applicable jurisdictions, or (b) as being of an equal or lesser scope or with greater detail, and (ii) contain any other information required by Article 9 of the Nevada UCC or any other applicable jurisdictions for the sufficiency or filing office acceptance of any financing statement or amendment.

Default Interest. Should default be made in payment of the Principal Sum and/or interest when due, the total sum remaining unpaid shall become immediately due and payable at the option of Holder of this Note and bear interest at the additional default interest rate of prime plus five percent (5%) per annum, compounded daily, or the maximum interest rate allowed by law, whichever rate is lower, until paid in full (the "Default Interest"). In addition to Maker's failure to make payment when due, should either Maker suffer upon himself for more than thirty (30) days without removal or elimination, any attachment, garnishment, execution, assignment for benefit of creditors, receivership, bankruptcy, judgment lien, tax lien or commit any act of bankruptcy, then Maker shall be considered in default and subject to immediate acceleration of the Principal Sum and Default Interest.

Allocation of Payment. In the event that Holder receives an amount in payment which is less than the principal and interest accrued to date, then such payment shall first be allocated first to the payment of accrued interest and second the payment of the principal balance hereof in the inverse order of maturity.

Waiver of Defenses. Maker and every endorser, guarantor, surety and any other person liable for payment of the indebtedness evidenced by this Note hereby waive demand for payment, presentment for payment, protest, notice of protest, notice of dishonor, and any other notice to which such person or persons might otherwise be entitled.

Rights upon Default. If either Maker defaults in the payment of the Principal Sum when due, then (i) Holder shall have all rights available under this Note, any security agreement securing this Note, or any related guaranty, or as otherwise provided at law or in equity and (ii) Maker shall pay Holder's reasonable costs and expenses incurred in the collection of the amount due under the Note, including but not limited to reasonable attorney fees, and in the event of court action, all costs and such additional sums and attorney fees as the court may award. Maker waives all right to a jury trial in connection with the enforcement of this Note.

Joint and several Liability. The obligations of Maker and every endorser, guarantor, surety and any other person liable for payment of all or any part of the indebtedness evidenced by this Note shall be joint and several.

Miscellaneous.

- (i) If any term, provision, covenant or condition of this Note, or any application of them, should be held by a court of competent jurisdiction to be invalid, void, or unenforceable, all provisions, covenants and conditions of this Note and all applications of them not held invalid, void or unenforceable, shall continue in full force and effect and shall in no way be affected, impaired or invalidated.
- (ii) The laws of the State of Nevada shall govern the validity, construction, performance and effect of this Note. Any action to enforce Maker's obligations may be brought in any court of competent jurisdiction in the State of Nevada.

DATED this ____ day of November, 2014.

MAKER: APCO CONSTRUCTION

By: Joe Pelan, APCO Construction

EXHIBIT “17”



May 9, 2013

VIA EMAIL ONLY: llamadoj@cityofnorthlasvegas.com

Mr. Joemel D. Llamado
Construction Management, Senior Engineer
City of North Las Vegas
2266 Civic Center
North Las Vegas, Nevada 89030

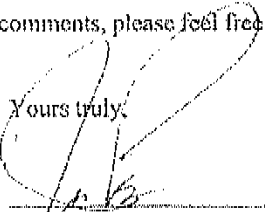
RE: CRAIG RANCH COR #39.1 & TIA #2

Dear Mr. Llamado:

Please find attached TIA #2 prepared by Hill International indicating the causations and delays associated with the 3 critical path items. Also please find attached Change Order Request #39.1 in the amount of \$1,090,066.50 as compensation for the costs associated with the extended schedule. In partnering with the City of North Las Vegas, APCO requests a meeting sometime during the week of May 20th – 24th at the City's convenience. We are in hopes of an amicable resolution to this issue and look forward to meeting with your staff.

If you have any questions or comments, please feel free to contact me at any time.

Yours truly,



Joe Pelan
Contract Manager
APCO Construction

cc: Jim Barker – Las Vegas Paving (via email)
Randy Nickerl – APCO Construction (via email)
Brian Bohn – APCO Construction (via email)

44 West Mayflower Ave. • North Las Vegas, Nevada 89030 • Phone: (702)734-0198 • Fax: (702)734-0396
E-Mail: apcoconstruction.com • Nevada Contractor's License: 0014563 • A/B • Unlimited

JA277

APCO Construction44 W. Mayflower
North Las Vegas, NEVADA 89030Phone: 702-734-0198
Fax: 702-734-0396**CHANGE ORDER REQUEST**

No. 00039.1

TITLE: TIA#1&#2 -COMPLETION DATE - 7/17/13

DATE: 5/9/2013

PROJECT: Craig Ranch Regional Park - Phase 2

JOB: 0193

TO: Attn: Joemel Llamado
City of North Las Vegas
Phone: 702-633-1230

CONTRACT NO: 1

RE:	To:	From:	Number:
DESCRIPTION OF PROPOSAL			
TIA #1 & #2 WITH COMPLETION DATE OF OCTOBER 22, 2013.			

Item	Description	Stock#	Quantity	Units	Unit Price	Tax Rate	Tax Amount	Net Amount
00001	DUST CONTROL & TRACK OUT (9 MONTHS)		9.000	MONTHS	\$14,583.00	0.00%	\$0.00	\$131,247.00
00002	SWPP (9 MONTHS)		9.000	MONTHS	\$833.00	0.00%	\$0.00	\$7,497.00
00003	SITE SECURITY (9 MONTHS)		9.000	MONTHS	\$12,491.50	0.00%	\$0.00	\$112,423.50
00004	GENERAL CONDITIONS		9.000	MONTHS	\$53,245.00	0.00%	\$0.00	\$479,205.00
00005	HOME OFFICE OVERHEAD (9 MONTHS)		9.000	MONTHS	\$30,366.00	0.00%	\$0.00	\$273,294.00
00006	MAINTENANCE (9 MONTHS)		9.000	MONTHS	\$9,600.00	0.00%	\$0.00	\$86,400.00

Unit Cost: \$1,090,066.50

Unit Tax: \$0.00

Total: \$1,090,066.50

APPROVAL:By: _____
Joemel Llamado

Date: _____

By: _____
Joe Polan

Date: 5/9/2013

Excludes 39

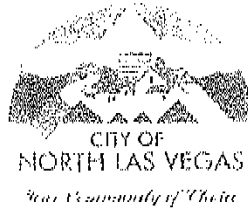
JA278

EXHIBIT “18”

Mayor
John J. Lee

Interim City Manager
Jeffrey L. Buchanan

Council Members
Anita C. Wood
Pamela A. Gaynes-Brown
Wade W. Wagner
Isaac E. Barron



Department of Public Works -- Dr. Qiong Liu, P.E., PTOE
2250 Las Vegas Boulevard, North - Suite 200 - North Las Vegas, Nevada 89030
Telephone: (702) 633-1919 - Fax: (702) 649-4696 - TDD: (800) 326-6868
www.cityofnorthlasvegas.com

October 2, 2013

Mr. Joe Pelan
APCO Construction
3432 N. 5th Street
North Las Vegas, NV 89032

Re: Craig Ranch Regional Park Phase II, Project No. 10294
Response to Time Impact Analysis Reports 1 and 2

Dear Mr. Pelan:

The City of North Las Vegas has reviewed the subject Time Impact Analysis (TIA's) submitted May 9, 2013 requesting \$1,090,066.50, based on 270 calendar days of compensatory delays. In our review, it was determined that APCO was granted 119 non compensatory calendar days bringing the contract completion from January 11, 2013 to May 10, 2013. Further review of the subject TIA's indicate APCO should be given an additional 61 calendar days of additional time extension is justifiable, but not compensatory.

Given the numerous changes and multiple delays that occurred during this project, but not included in your TIA's, the City is prepared to offer you compensatory delays of 165 days from May 10, 2013 to October 25, 2013, for a total amount of \$560,724.10 based on the following evaluation:

Bid Item	Description	Contr Days	Qty	Units	Unit Price (\$)	Daily Price (\$) (365 Days)
200.05	Dust Control & Track-Out	365	1.0	LS	\$ 65,000.00	\$ 180.68
200.06	SWPPP Control	365	1.0	LS	\$ 10,000.00	\$ 27.40
200.08	General Conditions	365	1.0	LS	\$ 638,960.00	\$ 1,750.63
200.09	Site Security	365	1.0	LS	\$ 140,898.00	\$ 410.68
200.10	Home Office Overhead	365	1.0	LS	\$ 304,392.00	\$ 988.33
	Total				\$ 1,433,610.00	\$ 3,937.64

This offer is based on the following conditions:

It is understood that by accepting this offer that both parties agree that the terms herein are full and final acceptance by both parties. Specifically APCO and the City of North Las Vegas agree that the City will provide APCO a notice of Substantial Completion on October 1, 2013. Any items that may be incomplete at that time will be included into the City's punchlist giving APCO (30) days to complete the

punchlist and any remaining items by November 25, 2013. The City will provide a final punchlist to APCO by October 11, 2013.

APCO will continue to have its crews work the necessary weekends to achieve the dates indicated herein at its expense.

All trailers, dumpsters, conex boxes, and appurtenances shall be removed from the site by October 14, 2013. All temporary fencing shall be removed from the site by October 24, 2013. The City shall provide locations at the Craig Ranch Maintenance Facility for storage of equipment and office space.

The City agrees to begin providing its own security forces on October 25, 2013.

By agreeing to and meeting the terms of this offer, it is understood by both parties that the City waives any and all liquidated damages accrued prior to the date of this offer. The City does not waive or limit its ability to enforce the terms of this offer.

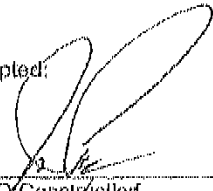
It is also understood that APCO will forgo any claims for delays, disruptions, general conditions and overtime costs associated with the weekend work previously performed and presently ongoing to achieve the above dates and for any other claim, present or future, that may occur on the project.

Upon acceptance of this offer by APCO the City agrees to allow APCO to bill the balance of the funds indicated above less prior payments on its September billing for the Project.

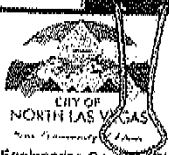
Sincerely,

Jeffrey L. Buchanan, Interim City Manager

Accepted:


APCO Construction

Date: 10/3/13



CONSTRUCTION CONFLICT AUTHORIZATION NO. 00050

Engineering Services Division

Phone: 633-1230

2250 N Las Vegas Boulevard, Ste 6

Fax: 642-0390

North Las Vegas, NV 89030

TDD: (800) 326-6868

E-Mail: tlamadoj@cityofnorthlasvegas.com

City of North Las Vegas

Craig Ranch Regional Park Phase 2 Project

TO: APCO Construction

3840 N. Commerce Street

North Las Vegas NV 89032

Date: October 10, 2013

ATTN: Joe Pelan

Subject: TIA #1 thru 10/25/13

Reference Spec. Section:

Gentlemen:

You are hereby directed to make the herein described changes from the plans and specifications or do the following described work not included in the plans and specifications of this contract. All new work herein described shall be done in accordance with the applicable provisions of the plans and specifications, except as modified by this document. NOTE: This order is not effective until approved by the Owner, or until an authorized Field Directive is executed.

DESCRIPTION OF CHANGE/REASON FOR CHANGE:

Time Impact Analysis offer to APCO (see attached).

COST OF CHANGE:

\$560,724.16

CONTRACT TIME ADJUSTMENT:

0 Day(s)

This construction conflict authorization constitutes full and complete compensation for all labor, equipment, materials, overhead, profit any and all indirect costs, and time adjustment to perform the above described change. All other costs are non-compensable.

Accepted By:
APCO Construction

Date:

Joe Pelan

Accepted By:

City of North Las Vegas

Date:

Manager

Construction Manager

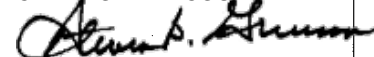
File No.: 10294

Issue File:

Page 1 of 1

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1 **Marquis Aurbach Coffing**
2 Avece M. Higbee, Esq.
3 Nevada Bar No. 3739
4 Cody S. Mounteer, Esq.
5 Nevada Bar No. 11220
6 Kathleen A. Wilde, Esq.
7 Nevada Bar No. 12522
8 10001 Park Run Drive
9 Las Vegas, Nevada 89145
10 Telephone: (702) 382-0711
11 Facsimile: (702) 382-5816
12 ahigbee@maclaw.com
13 cmounteer@maclaw.com
14 kwilde@maclaw.com
15 *Attorneys for Defendants*

DISTRICT COURT

CLARK COUNTY, NEVADA

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

13 **Plaintiff,**

14 **vs.**

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

20 **Defendants.**

Case No.: A-16-730091-C
Dept. No.: XVII

DEFENDANTS' REPLY IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT

21 Defendants APCO Construction ("APCO) and Safeco Insurance Company of America
22 ("Safeco") (collectively referred to as "Defendants") by and through the law firm of Marquis
23 Aurbach Coffing, hereby submit their Reply in Support of their Motion for Partial Summary
24 Judgment.

25 ///

26 ///

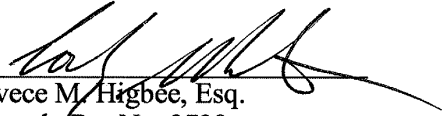
27 ///

28 ///

1 This Reply is made and based upon the points and authorities attached hereto, papers and
2 pleadings on file herein, and any argument of counsel at the time of hearing in this matter.

3 Dated this 21st day of June, 2017.

4 MARQUIS AURBACH COFFING

6 By: 
7 Avece M. Higbee, Esq.
8 Nevada Bar No. 3739
9 Cody S. Mounteer, Esq.
10 Nevada Bar No. 11220
11 Kathleen A. Wilde, Esq.
12 Nevada Bar No. 12522
13 10001 Park Run Drive
14 Las Vegas, Nevada 89145
15 *Attorneys for Defendants*

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I. INTRODUCTION.**

15 There is no dispute that the Project took longer than originally anticipated. Hence, the
16 very reason why APCO instructed Helix to provide timely documentation regarding any claim to
17 Helix's general extended conditions was so that APCO could, in turn, request payment for the
18 same from the City. After multiple requests and waiting several months for Helix to provide the
19 proper supporting documentation, APCO had no other choice than move forward and provide the
20 City a TIA and Request for Change Order that documented the costs caused by the delays in the
21 Project. Since Helix, through its own fault, had not provided the relevant documentation,
22 APCO's initial TIA naturally did not include Helix's purported costs. Months after APCO
23 submitted the TIA and Request for Change Order to the City, Helix submitted three Change
24 Orders that the City ultimately rejected at no fault of APCO. Helix was informed that the City
25 had rejected the Change Orders, but Helix ultimately chose to take no further action regarding
26 the matter.

27 More than two years after the Project closed, Helix filed a Complaint against APCO and
28 Safeco, wherein, Helix asserted five claims for relief relating to the three Change Orders that the

1 City rejected. In its first and second claims for relief, Helix alleged that APCO breached the
2 parties' subcontract and the implied covenant of good faith and fair dealing by failing to pay
3 Helix \$138,151 for extended overhead that resulted from the delays in the project.

4 Helix's claims must fail as a matter of law. For one, Helix materially breached the
5 Subcontract by failing to timely submit its claim with the proper documentation and it was this
6 breach that ultimately lead to the City denying Helix's costs. In addition, Helix's claims are
7 improper under the plain language of the Subcontract because Helix approved – and in fact,
8 requested – a pay-if-paid provision which conditioned Helix's receipt of payment upon APCO's
9 receipt of payment from the City. So, if ever there were a case where a pay-if-paid provision
10 must be found valid and enforceable, it is the case presently before the Court. Finally, while
11 Helix contends that summary judgment is improper because APCO either received payment for
12 Helix's extended overhead costs or was responsible for failing to request such costs from the
13 City, Helix fails to advance any evidence which demonstrates there is a genuine need for trial as
14 to either issue.

15 Thus, for these reasons and the reasons explained in more detail below, this Court should
16 grant APCO's motion for partial summary judgment.

17 **II. RECAP OF UNDISPUTED FACTS**

18 “A material fact is one which may affect the outcome of the litigation.” Commodity
19 Futures Trading Comm’n v. Savage, 611 F.2d 270, 282 (9th Cir. 1979); see also Anderson v.
20 Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986) (“Only disputes over facts
21 that might affect the outcome of the suit under the governing law will properly preclude the entry
22 of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.”).
23 Here, as evidenced by Helix's Opposition, there are no material disputes of fact which prohibit
24 summary judgment in the instant case:

25 With regard to the contract documents, it is undisputed that APCO and Helix engaged in
26 numerous rounds of negotiations wherein Helix reviewed a proposed subcontract and provided
27
28

1 section-by-section comments and/or changes to APCO.¹ During this revision process, Helix
2 specifically reviewed Section 4.4 the proposed subcontract, which stated:

3 4.4 Progress payments will be made by Contractor to
4 Subcontractor within 15 days **after Contractor actually receives**
5 **payment for Subcontractor's work from Owner.**

6 ...

7 **Any payments to Subcontractor shall be conditioned upon receipt of**
8 **the actual payments by Contractor from Owner.** Subcontractor herein
9 agrees to assume the same risk that the Owner may become insolvent that
10 Contractor has assumed by entering into the Prime Contract with the
11 Owner.

12 Although Helix requested two changes with regard to Section 4.4, neither change altered the
13 conditional pay-if-paid language in any way. Similarly, Helix reviewed and approved Section
14 4.8, which provided:

15 Subcontractor agrees that Contractor shall have no obligation to pay
16 Subcontractor for any changed or extra work performed by Subcontractor
17 until or unless Contractor has actually been paid for such work by the
18 Owner.

19 And, in addition to the pay-if-paid language in Section 4.4 and Section 4.8, **Helix** instructed
20 APCO:

21 **Section 6: Add the following:** "In the event the schedule as set forth
22 above is changed by Contractor for whatever reason so that Subcontractor
23 either is precluded from performing the work in accordance with said
24 schedule and thereby suffers delay, or, is not allowed the number of
25 calendar days to perform the work under such modified schedule and must
26 accelerate its performance, then Subcontractor shall be entitled to receive
27 from Contractor payment representing the costs and damages sustained by
28 Subcontractor for such delay or acceleration, providing said costs and
damages are first paid to Contractor."

Helix does not dispute that the final Subcontract then incorporated all of the revisions that the
parties negotiated, as well as the Prime Contract between APCO and the City.²

¹ Compare Defendants' Motion at 4-5 with Helix's Opposition at 15 (admitting "that Helix did not strike the pay-if-paid clause from the Subcontract" and "attempted to negotiate and clarify language in [the] pay-if-paid clause").

² See generally Helix's Opposition.

1 With regard to the Project, it is undisputed that the Project was originally scheduled for
2 completion on January 9, 2013, but, due to various delays, the Project was not completed until
3 October 25, 2013.³ Helix does not deny that APCO informed Helix of the delays and reminded
4 Helix that it was important to timely submit documentation for any additional costs that were
5 incurred so that APCO could submit Helix's claim to the City for its review.⁴ Helix does not
6 contend that it responded by sending proper documentation to APCO.⁵ Instead, Helix states that
7 it sent APCO a letter in which it vaguely "reserved all rights" to payment for its additional costs,
8 but waited "submit its formal Claim to APCO."⁶

9 So, when APCO submitted the May 9, 2013, TIA and Change Order Request to the City
10 in which it requested an additional \$1,090,066.50 to cover the costs associated with the extended
11 duration of the Project, this request did not – and *could not* – include costs attributable to Helix.⁷
12 Helix does not dispute that APCO received a mere \$560,724.16 from the City – *i.e.*, 51% of the
13 total that APCO had requested.⁸

14 With regard to Helix's requests for payment, it is undisputed that Helix's June 19, 2013,
15 letter included a summary of its "daily costs of extended overhead and an advisory that "Helix
16 will be pursuing payment for the cost as the project continues to run beyond the original"
17 (Emphasis added).⁹ Helix then sought payment for its purported extended overhead through
18
19

20 ³ Compare Defendants' Motion at 5-6 with Helix's Opposition at 4.

21 ⁴ See generally Helix's Opposition.

22 ⁵ See generally Helix's Opposition.

23 ⁶ Compare Defendants' Motion at 6 and n.13 with Helix's Opposition at 5 ("Helix planned to submit its
24 formal Claim once the project was completed so its total damages could be ascertained instead of
'piecemealing' its damages to APCO.").

25 ⁷ See Declaration of Victor Fuchs at ¶ 13 ("On August 27, 2013, Helix furnished APCO with its first
26 invoice for its Claim") (emphases added).

27 ⁸ See generally Helix's Opposition

28 ⁹ Compare Defendants' Motion at n.13 with Helix's Opposition at 5 and Helix's Exhibit 3.

1 three Change Order Requests, (Nos. 68, 68.1, and 93) which totaled \$138,151.¹⁰ It is undisputed
2 that APCO promptly submitted each of Helix's Change Order Requests to the City.¹¹ After the
3 City denied each of the Change Order Requests, Helix did not request reconsideration or take
4 any similar action.¹² In fact, it is undisputed the Helix did not send a demand for payment until
5 September 26, **2014** – nearly a year after the Project was closed out.¹³ In response to Helix's
6 untimely demand, APCO's President correctly informed Helix that it had not received payment
7 from the City for Helix's purported extended overhead costs.¹⁴ Thereafter, Helix made
8 additional demands for payment in which it proposed payment arrangements and/or a promissory
9 note.¹⁵ Although APCO's President expressed understanding for Helix's position,¹⁶ the parties
10 were unable to resolve the matter.

11 **III. LEGAL STANDARD**

12 Pursuant to NRCP 56(c), summary judgment is proper "if the pleadings, depositions,
13 answers to interrogatories, and admissions on file, together with the affidavits, if any, show that
14 there is no genuine issue as to any material fact and that the moving party is entitled to a
15 judgment as a matter of law."

16 The party moving for summary judgment has the initial burden of showing the absence of
17 a genuine issue of material fact. See, e.g., Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev.
18 598, 602, 172 P.3d 131, 134 (2007). But, where, as here, "the nonmoving party will bear the
19 burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of

20
21 ¹⁰ Change Order 68.1 specifies that Helix sought payment for extended overhead for January 13, 2013,
22 through August 30, 2013. Change Order 93 specifies the weeks of September 1, 2013, through October
23 25, 2013.

24 ¹¹ Compare Defendants' Motion at 6-8 with Helix's Opposition at 6, 8.

25 ¹² See generally Helix's Opposition; see also Defendants' Motion at 7-8.

26 ¹³ See Helix's Opposition at 9 and Exhibit 14 to Helix's Opposition.

27 ¹⁴ See Exhibit N to Defendants' Motion; see also Declaration of Joe Pelan at ¶14.

28 ¹⁵ See Helix's Exhibits 15 & 16.

¹⁶ See Helix's Exhibit 16 (email dated January 16, 2015).

1 production by either (1) submitting evidence that negates an essential element of the nonmoving
2 party's claim, or (2) "pointing out . . . that there is an absence of evidence to support the
3 nonmoving party's case." Id. at 602-03, 172 P.3d at 134 (quoting Celotex Corp. v. Catrett, 477
4 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986)). Indeed, "[w]hile the pleadings and other proof
5 must be construed in a light most favorable to the nonmoving party, the party that ultimately
6 bears the burden of proof must 'do more than simply show that there is some metaphysical
7 doubt' as to the operative facts in order to avoid summary judgment being entered in the moving
8 party's favor. Wood v. Safeway, Inc., 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (quoting
9 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356
10 (1986)); see also Collins v. Union Fed. Sav. & Loan Ass'n, 99 Nev. 284, 302, 662 P.2d 610, 621
11 (1983) ("[T]he opposing party is not entitled to build a case on the gossamer threads of whimsy,
12 speculation and conjecture.") (internal quotation marks and citation omitted).

13 **IV. LEGAL ARGUMENT**

14 Here, the parties agree as to all of the material facts, including the negotiation and terms
15 of their Subcontract, APCO's prompt submission of Helix's undocumented invoices to the City,
16 and Helix's failure to demand payment until after the close of the Project. Accordingly, the
17 question before this Court is whether there are any other genuine issues that prohibit judgment as
18 a matter of law as to Helix's contract-based claims.

19 Defendants respectfully submit that there are not. Accordingly, this Court should grant
20 the Defendants' motion for partial summary judgment and enter judgment in their favor with
21 regard to Helix's first claim for breach of contract and second claim for breach of the implied
22 covenant of good faith and fair dealing because: (A) Helix's breach of contract claim fails
23 because Helix materially breached the parties' Agreement by failing to provide timely notice;
24 (B) Nevada law honors the right of parties to freely contract; (C) Nevada law allows for pay-if-
25 paid provisions under some circumstances; (D) the pay-if-paid provision is valid and enforceable
26 pursuant to the facts and circumstances in this case; (E) APCO did not receive payment for
27 Helix's extended overhead costs, and (F) APCO submitted Helix's claims to the City in good
28 faith, and it was Helix's own actions that caused the City's rejection.

1 **A. HELIX’S BREACH OF CONTRACT CLAIM FAILS BECAUSE HELIX**
2 **MATERIALLY BREACHED THE AGREEMENT BY FAILING TO**
3 **PROVIDE TIMELY NOTICE.**

4 “A party’s failure to perform its obligation under a dependent covenant results in the
5 suspension of the complying party’s obligation to perform under the agreement. 14 *Williston on*
6 *Contracts* § 43:5 (4th ed., May 2017 update). Accordingly, Nevada law recognizes that “the
7 party who commits the first breach of a contract cannot maintain an action against the other for a
8 subsequent failure to perform.” *Bradley v. Nev.-Cal.-Or. Ry.*, 42 Nev. 411, 178 P. 906, 908-09
9 (1919); *see also Cladianos v. Friedhoff*, 69 Nev. 41, 45, 240 P.2d 208, 210 (1952) (“The law is
10 clear, however, that any affirmative tender of performance is excused when performance has in
11 effect been prevented by the other party to the contract”).

12 Here, the Prime Contract between APCO and the City specifies that all Change orders
13 must be promptly submitted along with itemized and detailed supporting documentation. The
14 Prime Contract was incorporated into the subcontract between APCO and Helix and, in addition,
15 Helix agreed that it was bound by the same obligations, liabilities, and responsibilities that
16 APCO owed to the City.¹⁷ Accordingly, the Subcontract required Helix to submit timely,
17 properly documented Changes Orders.

18 Although the Subcontract is clear regarding promptness, Helix repeatedly failed to make
19 timely requests for payment. Indeed, while Helix’s opposition focuses on the vague reservation
20 of rights that it included in its January 27, 2013, letter, the record evidences that Helix delayed in
21 at least six separate respects: (1) Helix failed to any explanation as to its purported extended
22 overhead until June 19, 2013, i.e., over a month after APCO submitted its TIA and Request for
23 Change Order to the City; (2) Helix waited to submit Change Order 68, which requested 33
24 weeks of extended overhead until August 27, 2013 – more than three months after APCO
25 submitted its TIA and Request for Change Order to the City; (3) Helix did not provide
26 documentation in support of Change Order 68 until October 31, 2013; (4) Helix submitted
27 Change Order 68.1 and 93 after the City addressed and awarded additional payment for the

28 ¹⁷ See Subcontract Sections 1.1 and 1.3.

1 delays in completing the Project that did not include Helix's purported work; (5) After learning
2 of the rejections from the City, Helix made no effort to request consideration, reserve its rights,
3 or file additional claims for money owed on the Project; and (6) Helix filed the demand letter
4 regarding retention payment on September 26, 2014 – four months after APCO closed the
5 Project with the City on May 22, 2014. And, more importantly, to this day Helix has yet to
6 provide sufficient documentation in support of its purported costs.

7 Citing Stone Forest Industries, Inc. v. United States, 973 F.2d 1548, 1550-51 (Fed. Cir.
8 1992), Helix contends that all of its delays were, at best, immaterial and insufficient to excuse
9 APCO's performance under the Agreement.¹⁸ In so arguing, Helix explicitly recognizes that
10 materiality is a case-specific inquiry,¹⁹ yet Helix ignores the fact that prompt remission of claims
11 was essential to the subcontractor-contractor relationship and the orderly completion of the
12 Project. After all, not only was prompt remission of claims an undisputable part of the contract
13 documents, but a necessary and practical part of completing a municipal Project.²⁰ The
14 importance of timeliness is all the more obvious given what actually happened here, as Helix's
15 failure to submit pass-through claims to APCO delayed APCO's ability to quickly and accurately
16 request compensation from the City until May 2013. Further, because Helix waited to assert
17 some of its claims until after the close of the project, the delays altogether prevented APCO from
18 requesting payment from the City for the claims.

19 Thus, it is neither fair nor accurate of Helix to write off its breach as minor and
20 insignificant when its own actions violated the letter and spirit of the contract documents and had
21 real negative consequences.

22 ¹⁸ Opposition at 11-12.

23 ¹⁹ See Opposition at 13 ("Determining what is a material breach of contract 'depends on the nature and
24 effect of the violation in light of how the particular contract was viewed, bargained for, entered into, and
25 performed by the parties.'" (quoting J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc., 120 Nev.
277, 89 P.3d 1009 (2000)).

26 ²⁰ See, e.g., Blake Const. Co. v. C. J. Coakley Co., 431 A.2d 569, 575 (D.C. 1981) ("We note
27 parenthetically and at the outset that, except in the middle of a battlefield, nowhere must men coordinate
28 the movement of other men and all materials in the midst of such chaos and with such limited certainty of
present facts and future occurrences as in a huge construction project.").

1 **B. NEVADA LAW HONORS THE RIGHT OF PARTIES TO FREELY**
2 **CONTRACT.**

3 “[I]t must not be forgotten that the right of private contract is no small part of the liberty
4 of the citizen, and that the usual and most important function of courts of justice is rather to
5 maintain and enforce contracts than to enable parties thereto to escape from their obligation on
6 the pretext of public policy.” Baltimore & O. S. W. Ry. Co. v. Voigt, 176 U.S. 498, 505, 20 S.
7 Ct. 385, 386 (1900). Nevada law similarly recognizes that the very purpose of contract law is to
8 “enforce the expectancy interests created by agreement between [] parties,” Calloway v. City of
9 Reno, 116 Nev. 250, 260, 993 P.2d 1259, 1265 (2000), and, as such, courts have a responsibility
10 to effectuate the intent of the parties to the greatest extent possible. See, e.g., Sheehan &
11 Sheehan v. Nelson Malley & Co., 121 Nev. 481, 488, 117 P.3d 219, 224 (2005) (“In interpreting
12 a contract, the court shall effectuate the intent of the parties”) (internal citation and quotation
13 marks omitted); see also Phillips v. Mercer, 94 Nev. 279, 282, 579 P.2d 174, 176 (1978) (“A
14 court should not interpret a contract so as to make meaningless its provisions.”).

15 Granted, Nevada law does recognize that “a court may refuse to enforce a provision of a
16 contract that contravenes the state’s public policy.” Picardi v. Eighth Judicial Dist. Court, 127
17 Nev. 106, 112, 251 P.3d 723, 726-27 (2011). But, given the importance of the right to contract,
18 the use of this authority must be exercised sparingly, in the rare circumstances “where the policy
19 against enforcement of a contract **clearly outweighs** the interest in its enforcement.” Sylver v.
20 Regents Bank, N.A., 129 Nev., Adv. Op. 30, 300 P.3d 718, 723 (2013) (emphasis added). See
21 also, Restatement (Second) of Contracts § 178(1) (1981) (“A promise or other term of an
22 agreement is unenforceable on grounds of public policy if . . . the interest in its enforcement is
23 clearly outweighed in the circumstances by a public policy against the enforcement of such
24 terms.”); Taylor v. Martin, 466 So.2d 977, 979 (Ala. Ct. Civ. App. 1985) (“The true test to
25 determine whether a contract is unenforceable because of public policy is whether the public
26 interest is injuriously affected in such a substantial manner that private rights thereunder should
27 yield to the public interest.”).

1 Unfortunately, “[o]ne finds many cases in which contracts are tested against public
2 policy, but rarely does one find a case in which the court attempts to answer these more general
3 questions [regarding balancing] or provide guidance for later courts evaluating slightly different
4 contracts.” First Alabama Bank of Montgomery, N.A. v. First State Ins. Co., 899 F.2d 1045,
5 1085 (11th Cir. 1990). Nevertheless, it is well-established that that “[t]here is no presumption
6 that a contract is illegal, and the burden of showing the wrong is upon the party who seeks to
7 deny his or her contractual obligation.” Frazier v. Goudschaal, 295 P.3d 542, 545 (Kan. 2013);
8 see also 5 *Williston on Contracts* § 12:3 (4th ed., updated May 2017) (“Although the power of
9 the courts to invalidate the bargains of parties on grounds of public policy is unquestioned and is
10 clearly necessary, the impropriety of a transaction should be convincingly established in order to
11 justify the exercise of the power.”). And, it is similarly well-established that “[t]he power to
12 declare a contract void based on a violation of public policy ‘is a very delicate and undefined
13 power and, like the power to declare a statute unconstitutional, should be exercised only in cases
14 free from doubt.’” Milton Constr. Co. v. State Highway Dep’t, 568 So.2d 784, 788 (Ala. 1990)
15 (quoting 17 Am Jur.2d Contracts § 178 (1964)). See also, e.g., Moore v. Jones, 542 A.2d 1253,
16 1255 (D.C. 1988) (“[C]ourts will invalidate contract terms that are contrary to public policy only
17 in the clearest of cases, and with great caution.”).

18 Thus, to summarize, “[c]ourts are increasingly sensitive to the need to balance their views
19 concerning what public policy demands with the need to fix their own limitations, and generally,
20 whenever it is possible, . . . will interpret a contract so as to uphold it.” 5 *Williston on Contracts*
21 § 12:3 (4th ed., updated May 2017).

22 **C. NEVADA LAW ALLOWS FOR PAY-IF-PAID PROVISIONS UNDER**
23 **SOME CIRCUMSTANCES.**

24 Helix broadly states that “the pay-if-paid provision APCO relies upon the Subcontract is
25 void, unenforceable and against public policy.”²¹ In reality, Nevada law regarding pay-if-paid
26 clauses is more nuanced than Helix would have the Court believe.

27

28 ²¹ Opposition at page 2.

1 Indeed, while APCO need not duplicate the “scholarly discussion”²² from its motion, it
2 bears repeating that the controlling statute, NRS 624.626, does not outright prohibit pay-if-paid
3 clauses. Further, while the Supreme Court of Nevada’s decisions in Lehrer McGovern Bovis,
4 Inc. v. Bullock Insulation, Inc., 124 Nev. ___, 185 P.3d 1055 (June 2008) (“Lehrer I”), and
5 Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc., 124 Nev. 1102, 197 P.3d 1032 (Oct.
6 2008) (“Lehrer II”), undeniably caused confusion, neither decision holds that pay-if-paid
7 provisions are *per se* unenforceable. Instead, the dictum²³ regarding pay-if-paid provisions
8 suggests that enforceability is a matter for courts to consider on a case-by-case basis. See Lehrer
9 II, 124 Nev. at 1116, 197 P.3d at 1041 (“The enforceability of each lien waiver clause must be
10 resolved on a case-by-case basis”); see also id. at 1117 n.50, 197 P.3d at 1042 n.50 (“Pay-if-paid
11 provisions entered into subsequent to the Legislature’s amendments are enforceable only in
12 limited circumstances and are subject to the restrictions laid out in [the statute.].”).

13 Contrary to Helix’s argument, Cashman Equipment Company v. West Edna Associates,
14 Ltd., 132 Nev., Adv. Op. 69, 380 P.3d 844 (2016), also did not resolve the remaining questions
15 regarding pay-if-paid provisions. Instead, the issue in Cashman Equipment was whether an
16 unconditional mechanic’s lien waiver was valid under NRS 108.2457(5)(e) where the checks
17 given in exchange for the release did not clear the bank. Id., 380 P.3d at 846-47. In addressing
18 this issue, the Supreme Court reiterated confirmed that “district courts must ‘engage in a public
19 policy analysis particular to each lien waiver provision that the court is asked to enforce.’” Id.,
20 380 P.3d at 848 (quoting Lehrer II, 124 Nev. at 1116, 197 P.3d at 1041). But, rather than
21 expanding upon or explaining its decisions in Lehrer, the Court ruled that the waiver in question
22 was improper because the plain statutory language in NRS 108.2457(5)(e), reads:

23
24 ²² To the extent Helix faults APCO for its “scholarly discussion,” Opposition at 18, Helix’s criticism is
25 unfounded. After all, matters of unsettled law and determinations regarding dicta require a careful,
thoughtful approach, rather than the broad, sweeping approach that Helix pushes.

26 ²³ Argentina Consol. Min. Co. v. Jolley Urga Wirth Woodbury & Standish, 125 Nev. 527, 536, 216 P.3d
27 779, 785 (2009) (“A statement in a case is dictum when it is “unnecessary to a determination of the
28 questions involved.” (Quoting Stanley v. Levy & Zentner Co., 60 Nev. 432, 448, 112 P.2d 1047, 1054
(1941)).

1 Notwithstanding any language in any waiver and release form set forth in this
2 section, if the payment given in exchange for any waiver and release of lien is
3 made by check, draft or other negotiable instrument, and the same fails to clear
the bank on which it is drawn for any reason, then the waiver and release shall be
deemed null, void and of no legal effect whatsoever.

4 Id., 380 P.3d at 848-49. So, the Cashman Equipment Court resolved the appeal regarding
5 mechanic's liens on two uncontroversial bases: (1) Statutes should be construed according to
6 their plain language; and (2) district courts must use a case-specific, public policy analysis when
7 asked to enforce a mechanic's lien waiver. The decision did not, however, have anything to do
8 with Lehrer or NRS 624.626.

9 Thus, to summarize, there remain many questions regarding Nevada's law on pay-if-paid
10 provisions. Helix is incorrect, however, in stating that the provisions are *per se* unenforceable
11 because the Supreme Court of Nevada would not have revised its opinion in Lehrer if its intent
12 was disallow pay-if-paid clauses under all circumstances. And, while Cashman Equipment
13 acknowledged the public policy analysis that the Court described in Lehrer, Cashman Equipment
14 simply did not provide any clarification regarding pay-if-paid provisions such as the one in the
15 instant case.

16 **D. THE PAY-IF-PAID PROVISION IS VALID AND ENFORCEABLE**
17 **BECAUSE OF THE FACTS AND CIRCUMSTANCES IN THIS CASE.**

18 As previously noted, dicta is not controlling, Kaldi v. Farmers Ins. Exch., 117 Nev. 273,
19 282, 21 P.3d 16, 22 (2001), and, as such, there is a fair argument that the Lehrer decisions have
20 no bearing on the instant case. Nevertheless, even if the Court is inclined to treat the Supreme
21 Court's reasoning as persuasive,²⁴ it is best to consider the pay-if-paid clause under the unique
22 facts and circumstances in this case. Indeed, while the Supreme Court has yet to address how to
23 assess the enforceability of a pay-if-paid clause, it has stated that a case-by-case assessment is
24 appropriate where a contract includes a lien waiver provision. Lehrer II, 124 Nev. at 1116, 197
25 P.3d at 1041 ("The enforceability of each lien waiver clause must be resolved on a case-by-case
26 basis"). And, while the applicable law regarding liens differs from the prompt payment

27 ²⁴ Humphrey's Ex'r v. United States, 295 U.S. 602, 627, 55 S. Ct. 869, 874 (1935) (holding that "dicta []
28 may be followed if sufficiently persuasive" even though it is "not controlling").

1 provisions in Chapter 624, the Supreme Court has indicated that its concerns regarding pay-if-
2 paid provisions stem from the same public policy concerns regarding secure payment for
3 contractors. Id. at 1116-18, 197 P.3d at 1041-42.

4 Here, the pay-if-paid provisions are less problematic than the clause in the Lehrer
5 decisions because Helix had an opportunity to negotiate with APCO regarding the terms of the
6 subcontract and, in fact, it was Helix that added pay-if-paid language into Section 6-6.1 of the
7 Agreement. Further, the pay-if-paid provisions are reasonable under the circumstances of this
8 case because the general contract and the subcontract set forth a reasonable method by which
9 APCO could request payment from the City for payment to subcontractors. So, in effect, the
10 purpose of the pay-if-paid provision was simply to improve the orderly administration of the
11 project and to protect APCO from becoming a de factor lender to the City in the event of non-
12 payment. See Lehrer II, 124 Nev. at 1116, 197 P.3d at 1041 (recognizing that “contractors are
13 generally in a vulnerable position because they extend large blocks of credit; invest significant
14 time, labor, and materials into a project; and have any number of workers vitally depend upon
15 them for eventual payment.”).

16 Helix does not squarely dispute the validity of these arguments. In fact, Helix admits that
17 it “did not strike the pay-if-paid clause” and actually “attempted to negotiated and clarify
18 language in [the] pay-if-paid clause.” See Opposition at 15. Instead, Helix contends that
19 regardless of the parties’ negotiations and agreement, the Court should invalidate the pay-if-paid
20 clause because “contracts that attempt to limit or prospectively waive and/or release payment
21 rights, or circumvent the Statutes, are void and unenforceable.” Opposition at 17-18 (citing
22 Hardy Companies, Inc. v. SNMark, LLC, 126 Nev. 528, 539, 245 P.3d 1149, 1156 (2010)).

23 There are two fundamental problems with Helix’s argument. First, Helix’s reliance on
24 Hardy is misplaced because the issue there was limited to “whether recent legislative
25 amendments to the mechanic’s lien law [NRS 108.2453] abrogated or overruled Fondren v. K/L
26 Complex, Ltd., 106 Nev. 705, 800 P.2d 719 (1990), and Nevada’s substantial compliance
27 doctrine.” 126 Nev. at 531, 245 P.3d at 1151-52. Indeed, while the Court quoted portions of the
28 mechanic’s lien statute which invalidate conditions, stipulations, or provisions in a contract that

1 require a lien claimant to waive lien rights, the Court's holding simply that certain amendments
2 in 2003 and 2005 did not change existing law regarding substantial compliance. Id. at 543, 245
3 P.3d at 1159 ("We hold that NRS 108.2453 does not abrogate Fondren or Nevada's substantial
4 compliance doctrine.").

5 Second, while Helix is generally correct that parties cannot "agree to make an illegal
6 provision legal," Opposition at 15, the parties did not attempt to do so. Instead, the parties
7 negotiated and executed a Subcontract based on their needs and their understanding of the law.
8 In doing so, the parties agreed to include pay-if-paid provisions that they understood to be legal
9 and practical under the circumstances. Although Helix is now trying to backtrack by questioning
10 the legality of such provisions, the law regarding pay-if-paid provisions was – and remains –
11 confusing at best. See Section IV(C), supra. So, "[u]ntil firmly and solemnly convinced that an
12 existent public policy is clearly revealed, this Court's duty is "to maintain and enforce [the]
13 contract[] [rather] than to enable parties thereto to escape from their obligation on the pretext of
14 public policy[.]" Law Capital, Inc v. Kettering, 836 N.W.2d 642, 646 (S.D. 2013) (quoting
15 Bartron v. Codington Cty., 2 N.W.2d 337, 344 (S.D. 1942)).

16 So, to summarize, this Court should uphold the pay-if-paid provisions because "[m]ost
17 courts will enforce a properly worded pay-if-paid provision." William M. Hill & Mary-Beth
18 McCormack, *Pay-If-Paid Clauses: Freedom of Contract or Protecting the Subcontractor from*
19 *Itself?*, CONSTR. LAWYER, at 26, 27 (Winter 2011). See also, e.g., 8 Williston on Contracts §
20 19:59 (4th ed., updated May 2017) ("[I]f the parties clearly do intend that the risk of nonpayment
21 be borne by the subcontractor and clearly express that intent by making the right of the
22 subcontractor to be paid expressly conditional on the receipt of such payment by the contractor
23 from the owner, they may by contract allocate that risk, and the courts will enforce that freely
24 bargained-for allocation of risk."); Galloway Corp. v. S.B. Ballard Const. Co., 464 S.E.2d 349,
25 354 (Va. 1995) ("If, as in Dyer, [303 F.2d 655,] a contract on its face reasonably contemplates
26 eventual payment by the general contractor to the subcontractor, or, as in Gilbane, [585 A.2d
27 248], the parties clearly intend there to be a condition precedent fulfilled before payment comes
28 due, the contract will be construed as written and will not be reformed by the court."). And,

1 despite Helix's argument to the contrary, neither Lehrer nor Nevada public policy allow for a
2 subcontractor to demand payment from a contractor after the subcontractor has negotiated the
3 terms of the Subcontract (including a pay-if-paid provision), failed to comply with the terms it
4 agreed to, and missed every opportunity to timely request payment from the Project owner.

5
6 **E. APCO DID NOT RECEIVE PAYMENT FOR HELIX'S EXTENDED
OVERHEAD COSTS.**

7 While APCO did receive partial payment from the City for the additional costs incurred
8 because of the delays at the Project. Helix incorrectly asserts that the October 2013 payment
9 from the City included – or should have included – payment for Helix's extended overhead costs.
10 Opposition at 19-20.

11 As addressed previously, APCO sent the City a TIA and Change Order in May 2013. In
12 the Change Order, APCO requested payment for an additional nine months of services, including
13 dust control, security, and home office overhead. The Change Order did not, however, request
14 additional payment for Helix's extended overhead costs because Helix failed to provide APCO
15 with any documentation or detailed information regarding its costs. In fact, the communications
16 from Helix were limited to vague assertions that Helix would be seeking payment at some future
17 date. See January 28, 2013 letter, attached as Exhibit 2 to Helix's Opposition ("Please accept
18 this notice that Helix Electric reserves all rights to any and all additional costs incurred); June 19,
19 2013, letter, attached as Exhibit 3 to Helix's Opposition ("Helix will be pursuing payment for the
20 cost as the project continues"). And, Helix even admits in its Opposition that it "did not submit
21 its formal Claim to APCO" because it was waiting until "the Project was completed so its total
22 damages could be ascertained instead of 'piecemealing.'" Opposition at 4-5. Accordingly, when
23 the City approved the Change Order in part and granted additional compensation to APCO, there
24 was no basis upon which to pay Helix from the additional funds.²⁵

25
26
27 ²⁵ To the extent Helix argues that APCO should have revised the TIA and Change Order, its argument is
28 mistaken. After all, the City made its offer on October 2, 2013 – less than a week after Helix submitted
Change Order 68. Further, Helix did not make a complete demand for payment until September 26, 2014
– nearly a year after the Project was closed out.

1 Thus, if APCO is now forced to unjustly cover Helix's extended overhead costs, it will
2 have to use its own funds – not compensation from the City – to pay for Helix's failure to
3 comply with material portions of the Subcontract and Helix's failure to provide timely
4 documentation.

5 **F. APCO SUBMITTED HELIX'S CLAIMS TO THE CITY IN GOOD FAITH.**

6 To succeed on a claim for breach of the covenant of good faith and fair dealing, a
7 plaintiff must prove:

- 8 (1) The plaintiff and defendants were parties to an agreement;
- 9 (2) The defendant(s) owed the plaintiff a duty of good faith;
- 10 (3) The defendant(s) breached that duty by performing in a manner that was
11 unfaithful to the purpose of the contracts; and
- 12 (4) The plaintiff's justified expectations were denied.

13 See, e.g., Perry v. Jordan, 111 Nev. 943, 945, 900 P.2d 335, 338 (1995) (Per Curiam).

14 Here, it is undisputed that Helix and APCO were parties to a valid subcontract. Further,
15 it is undisputed that APCO owed Helix a duty of good faith and fair dealing. Hilton Hotels Corp.
16 v. Butch Lewis Prods., Inc., 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993) ("It is well
17 established within Nevada that every contract imposes upon the contracting parties the duty of
18 good faith and fair dealing."). Thus, the primary issues are whether APCO performed in a matter
19 that was unfaithful to the purpose of the subcontract and whether Helix had justified expectations
20 which were denied because of APCO's actions.

21 In its Opposition, Helix argues that APCO misrepresented the reason that the City
22 rejected Helix's claims.²⁶ In so arguing, Helix contends that the primary problem was the lack of
23 privity between the City and Helix, rather than Helix's failure to timely submit properly
24 documented claims.

25 Helix's argument is irreconcilable with the facts in this case, including the undisputed
26 evidence that the majority of Helix's change orders were submitted, approved, and paid without

27 _____
28 ²⁶ Opposition at 17-18.

1 any issue. Moreover, Helix's argument is fundamentally flawed because, once again, Helix
2 faults APCO for Helix's own wrongdoing. Indeed, when Helix submitted its untimely,
3 unsupported claims, Helix knew or should have known that there would be problems with the
4 City. Nevertheless, APCO submitted the claims to the City with the good faith hope that the
5 City would pay Helix for its services. After the City unsurprisingly rejected the claims, APCO
6 notified Helix of the issue so that Helix would have an opportunity to correct its errors and
7 submit proper claims. Helix elected not to do so. So, given Helix's own lack of diligence, it is
8 difficult to fathom how APCO was unfaithful to the purpose of the parties' subcontract when it
9 went above and beyond its end of the bargain by attempting to help Helix get paid.

10 As such, this Court should grant summary judgment in favor of APCO with regard to
11 Helix's second claim for breach of the implied covenant of good faith and fair dealing.

12 **V. CONCLUSION**

13 For the foregoing reasons, the Defendants respectfully request that this Court grant
14 summary judgment in their favor with regard to Helix's first and second causes of action.

15 Dated this 21st day of June, 2017.

16 MARQUIS AURBACH COFFING

17 By: 

18 Avece M. Higbee, Esq.
19 Nevada Bar No. 3739
20 Cody S. Mounteer, Esq.
21 Nevada Bar No. 11220
22 Kathleen A. Wilde, Esq.
23 Nevada Bar No. 12522
24 10001 Park Run Drive
25 Las Vegas, Nevada 89145
26 *Attorneys for Defendants*
27
28

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 21st day of June, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:²⁷

Peel Brimley LLP**Contact**

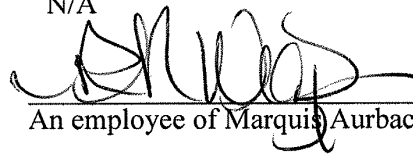
Amanda Armstrong
Cary B. Domina
Rosey Jeffrey
Terri Hansen

Email

aarmstrong@peelbrimley.com
cdomina@peelbrimley.com
rjeffrey@peelbrimley.com
thansen@peelbrimley.com

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

N/A



An employee of Marquis Aurbach Coffing

²⁷ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Building and Construction

COURT MINUTES

July 26, 2017

A-16-730091-C Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

**July 26, 2017 8:30 AM Defendants' Motion for Partial Summary
Judgment**

HEARD BY: Villani, Michael

COURTROOM: RJC Courtroom 11A

COURT CLERK: Olivia Black

RECORDER: Cynthia Georgilas

PARTIES

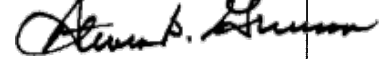
PRESENT: Domina, Cary Attorney for Plaintiff
 Munteer, Cody S. Attorney for Defendants

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.

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

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Steven D. Grierson
CLERK OF THE COURT



1 RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
2 CARY B. DOMINA, ESQ.
Nevada Bar No. 10567
3 **PEEL BRIMLEY LLP**
3333 E. Serene Avenue, Suite 200
4 Henderson, Nevada 89074-6571
Telephone: (702) 990-7272
5 Fax: (702) 990-7273
rpeel@peelbrimley.com
6 cdomina@peelbrimley.com
Attorneys for Helix Electric of Nevada, LLC

7
8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

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

11 Plaintiff,

12 vs.

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

16 Defendants.

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

**ORDER DENYING MOTION FOR
PARTIAL SUMMARY JUDGMENT**

17
18 This matter came on for hearing July 26, 2017 before the Honorable Michael Villani in
19 Dept. 16 on Defendant's Motion for Partial Summary Judgment. Cary B. Domina, Esq. of
20 PEEL BRIMLEY LLP appeared on behalf of Plaintiff, HELIX ELECTRIC OF NEVADA
21 ("Helix" or "Plaintiff") and Cody Munteer of MARQUIS AURBACH COFFING appeared on
22 behalf of Defendants APCO Construction and Safeco Insurance Company of America.

23 The Court having considered all of the pleadings and papers on file, and after review of
24 the pleadings on file and oral argument by counsel, finds as follows:

25 1. The Court finds that it must deny the Motion for Partial Summary Judgment as
26 there are questions of fact which preclude the Court from granting the Motion.

27 2. The Court specifically finds that there are questions of fact regarding:
28

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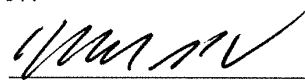
PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

- 1 a. the timeliness and extent of Helix's notices of claim for payment to APCO;
2 and
3 b. whether APCO could have supplemented Helix's notices of claim for
4 payment in the settlement negotiations and the settlement package APCO
5 submitted to the City of North Las Vegas.

6 Therefore, the Court Orders as follows:

7 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Defendants'
8 Motion for Partial Summary Judgment is **DENIED**.

9 DATED this 31 day of August, 2017.




11 **DISTRICT COURT JUDGE** *fn*

12 Approved as to Form and Content:
13 **MARQUIS AURBACH COFFING**

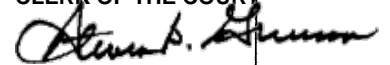


15 Avece M. Higbee, Esq. (SBN 3739)
16 Cody S. Mounteer, Esq. (SBN 11220)
17 Neil M. Sansone, Esq. (SBN 13948)
18 10001 Park Run Drive
19 Las Vegas, Nevada 89145
20 Phone: (702) 382-0711
Attorneys for Defendants
APCO Construction and Safeco
Insurance Company of America

21 Submitted by:
22 **PEEL BRIMLEY LLP**



24 Richard L. Peel, Esq. (SBN 4359)
25 Cary B. Domina, Esq. (SBN 10567)
26 3333 E. Serene Avenue, Suite 200
27 Henderson, NV 89074-6571
28 Phone: (702) 990-7272
Attorneys for Plaintiff
Helix Electric of Nevada, LLC



1 RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
2 CARY B. DOMINA, ESQ.
Nevada Bar No. 10567
3 **PEEL BRIMLEY LLP**
3333 E. Serene Avenue, Suite 200
4 Henderson, Nevada 89074-6571
Telephone: (702) 990-7272
5 Fax: (702) 990-7273
rpeel@peelbrimley.com
6 cdomina@peelbrimley.com
7 *Attorneys for Helix Electric of Nevada, LLC*

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

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

11 Plaintiff,

12 vs.

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

16 Defendants.

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

ORDER DENYING:

- (I) MOTION TO DISMISS; AND
(II) MOTION FOR FEES AND
COSTS

18 This matter came on for hearing May 17, 2017 before the Honorable Michael Villani in
19 Dept. 16 on Defendant's Motion to Dismiss Plaintiff's Claims Against Bond and
20 Countermotion for Fees and Costs of Motion. Cary B. Domina, Esq. of PEEL BRIMLEY LLP
21 appeared on behalf of Plaintiff, HELIX ELECTRIC OF NEVADA ("Helix" or "Plaintiff") and
22 Cody Mounteer of MARQUIS AURBACH COFFING appeared on behalf of Defendants
23 APCO Construction and Safeco Insurance Company of America.

24 The Court having considered all of the pleadings and papers on file, and after review of
25 the pleadings on file and oral argument by counsel, this COURT DEFERRED its decision on
26 this matter and now rules as follows:
27
28

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1 1. In ruling upon a motion to dismiss, the court recognizes all factual allegations in
2 the complaint as true and draws all inferences in its favor. *Buzz Stew. LLC v. City of N. Las*
3 *Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

4 2. The Complaint should be dismissed under NRCP 12(b)(5) only if it appears
5 beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief. *Id.*
6 Allegations in the Complaint must be taken at face value and must be construed favorably in
7 the nonmoving party's behalf. *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 111 (1985).

8 3. To determine if a cause of action is sufficient to assert a claim for relief, the
9 Court should determine “whether the allegations give fair notice of the nature and basis of the
10 claim and the relief requested.” *Ravera v. City of Reno*, 100 Nev. 68, 70, 675 P.2d 407, 408
11 (1984).

12 4. The instant Motion requires this Court to determine the date in which a claim is
13 to be made against a bond for a public works project known as the Craig Ranch Regional Park
14 Phase II project (the “Project”).

15 5. Safeco, as surety and APCO as principal executed and delivered a labor and
16 material bond for said Project. It is undisputed that the City of North Las Vegas (“CNLV”)
17 approved the final work on the Project on July 2, 2014.

18 6. Safeco argues that pursuant to NRS 339.055 Helix was required to commence
19 its action within one year from the date the claimant (Helix) performed the last of the labor or
20 furnished materials.

21 7. Giving Helix the benefit of the doubt, Safeco argues the last date to file such a
22 claim on the Bond would be July 2, 2015 and because Helix filed the present matter on January
23 12, 2016, it is barred as a matter of law from pursuing its claim under the Bond.

24 8. Helix argues that the Bond in question provides for a two-year time frame for
25 claims based on the language of the contract, thereby superseding the statute by agreement of
26 the parties and supports its claim by urging this Court to adopt the reasoning of *Royal*
27 *Indemnity Co. v. Special Service*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966).

28 9. The language of the Bond in dispute is the following:

1
2 “This bond shall insure [sic] to the benefit of any persons,
3 companies or corporations entitled to the claims under applicable
4 State law. This bond shall remain in effect until two (2) years after
5 the date of the final acceptance of the Work by the City Council.”

6
7 10. It is undisputed that NRS 339.005 provides that a claim under a bond must be
8 brought within one year. The first sentence in the quoted language “persons, companies or
9 corporations entitled to the claims under applicable State law” incorporates those entities
10 covered under NRS 339.035.

11
12 11. However, the second sentence of the bond language in question demonstrates a
13 clear intent by the parties to extend the claims period of the bond to two years. To support its
14 conclusion, the Court looks to the language “shall remain in effect until two (2) years after the
15 date of the final acceptance.”

16
17 12. The plain meaning of “in effect” is defined as “operating or functioning; in
18 force.” See TAKE EFFECT, Black's Law Dictionary (10th ed. 2014). Therefore, based on a
19 plain interpretation of the clause in question, the two-year language expands the contract, as
20 allowed under Royal for the following reasons.

21
22 13. The purpose of NRS 339.025 cannot be read in harmony with the two-year
23 claims provision contained on the face of the Bond. NRS 339.025(1)(b) states “*The bond must*
24 *be solely for the protection of claimants supplying labor or materials to the contractor to*
25 *whom the contract was awarded, or to any of his or her subcontractors, in the prosecution of*
26 *the work provided for in such contract.*” (emphasis added). Such language makes it clear that
27 the bond in question was only required for claims of labor or materials and for nothing else.

28
29 14. Therefore, the only parties who could make a claim to this bond would be those
30 who supply labor or materials and by statute, these parties would be bound to a one-year
31 Statute of Limitations period under NRS 339.055, which directly conflicts with the two-year
32 language on the face of the bond.

33
34 15. Because such a conflict exists, the Court finds that no other intent could have
35 existed, except for the drafter to have intended to extend the claims period in excess of the time
36 allowed by statute. See generally, *Royal Indemnity Co. v. Special Service*, 82 Nev.

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

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2 P.2d 725 (1985), (Holding that bonds should be liberally construed to the benefit of
3 beneficiaries under the bond, as opposed to in favor a surety).

4 Therefore, the Court Orders as follows:

5 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Safeco's Motion
6 to Dismiss is **DENIED**; and

7 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Safeco's Motion
8 for Fees and Costs is also **DENIED**.

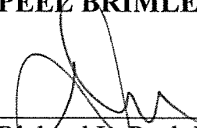
9 DATED this ____ day of August, 2017.

10
11 DISTRICT COURT JUDGE

12 Approved as to Form and Content:
13 **MARQUIS AURBACH COFFING**

14
15 Avece M. Higbee, Esq. (SBN 3739)
16 Cody S. Mounteer, Esq. (SBN 11220)
17 Neil M. Sansone, Esq. (SBN 13948)
18 10001 Park Run Drive
19 Las Vegas, Nevada 89145
20 Phone: (702) 382-0711
21 *Attorneys for Defendants*
22 *APCO Construction and Safeco*
23 *Insurance Company of America*

24 Submitted by:
25 **PEEL BRIMLEY LLP**

26 
27 Richard L. Peel, Esq. (SBN 4359)
28 Cary B. Domina, Esq. (SBN 10567)
3333 E. Serene Avenue, Suite 200
Henderson, NV 89074-6571
Phone: (702) 990-7272
Attorneys for Plaintiff
Helix Electric of Nevada, LLC

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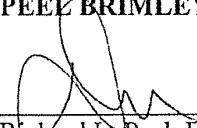
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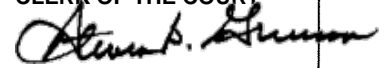
10 
11 _____
DISTRICT COURT JUDGE *FB*

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Attorneys for Defendants
APCO Construction and Safeco
Insurance Company of America

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22 **PEEL BRIMLEY LLP**

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25 Cary B. Domina, Esq. (SBN 10567)
26 3333 E. Serene Avenue, Suite 200
27 Henderson, NV 89074-6571
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Attorneys for Plaintiff
Helix Electric of Nevada, LLC



1 RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
2 CARY B. DOMINA, ESQ.
Nevada Bar No. 10567
3 **PEEL BRIMLEY LLP**
3333 E. Serene Avenue, Suite 200
4 Henderson, Nevada 89074-6571
Telephone: (702) 990-7272
5 Fax: (702) 990-7273
rpeel@peelbrimley.com
6 cdomina@peelbrimley.com
7 *Attorneys for Helix Electric of Nevada, LLC*

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

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

11 Plaintiff,

12 vs.

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

16 Defendants.

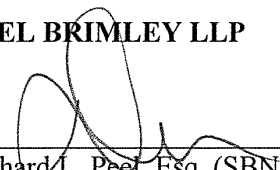
CASE NO.: A-16-730091-C
DEPT. NO.: XVII

NOTICE OF ENTRY OF ORDER

17
18 **PLEASE TAKE NOTICE** that an Order Denying Motion for Partial Summary
19 Judgment was entered on the 31st day of August, 2017 and electronically filed with the Court
20 on September 7, 2017, a copy of which is attached hereto.

21 DATED this 7th day of September, 2017.

22 **PEEL BRIMLEY LLP**

23
24
25 
Richard L. Peel, Esq. (SBN 4359)
26 Cary B. Domina, Esq. (SBN 10567)
3333 E. Serene Avenue, Suite 200
27 Henderson, NV 89074-6571
Phone: (702) 990-7272
28 *Attorneys for Plaintiff*
Helix Electric of Nevada, LLC

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

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 7th day of September, 2017, I caused the above and foregoing document entitled

NOTICE OF ENTRY OF 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
- ☐ emailed to all interested parties.

E-Service Master List

Helix Electric of Nevada LLC, Plaintiff(s) vs. APCO Construction, Defendant(s)

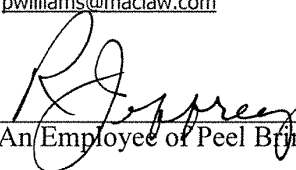
Marquis Aurbach Coffing

Contact

Avece M. Higbee, Esq.
Cody Mounteer, Esq.
Jennifer Case
Penny Williams

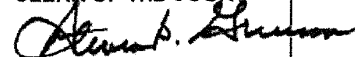
Email

ahigbee@maclaw.com
cmounteer@marquisaurbach.com
jcase@maclaw.com
pwilliams@maclaw.com


An Employee of Peel Brimley LLP

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

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Steven D. Grierson
CLERK OF THE COURT



1 RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
2 CARY B. DOMINA, ESQ.
Nevada Bar No. 10567
3 **PEEL BRIMLEY LLP**
3333 E. Serene Avenue, Suite 200
4 Henderson, Nevada 89074-6571
Telephone: (702) 990-7272
5 Fax: (702) 990-7273
rpeel@peelbrimley.com
6 cdomina@peelbrimley.com
7 *Attorneys for Helix Electric of Nevada, LLC*

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

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

11 Plaintiff,

12 vs.

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

16 Defendants.

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

**ORDER DENYING MOTION FOR
PARTIAL SUMMARY JUDGMENT**

18 This matter came on for hearing July 26, 2017 before the Honorable Michael Villani in
19 Dept. 16 on Defendant's Motion for Partial Summary Judgment. Cary B. Domina, Esq. of
20 PEEL BRIMLEY LLP appeared on behalf of Plaintiff, HELIX ELECTRIC OF NEVADA
21 ("Helix" or "Plaintiff") and Cody Munteer of MARQUIS AURBACH COFFING appeared on
22 behalf of Defendants APCO Construction and Safeco Insurance Company of America.

23 The Court having considered all of the pleadings and papers on file, and after review of
24 the pleadings on file and oral argument by counsel, finds as follows:

25 1. The Court finds that it must deny the Motion for Partial Summary Judgment as
26 there are questions of fact which preclude the Court from granting the Motion.

27 2. The Court specifically finds that there are questions of fact regarding:
28

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

- 1 a. the timeliness and extent of Helix's notices of claim for payment to APCO;
2 and
3 b. whether APCO could have supplemented Helix's notices of claim for
4 payment in the settlement negotiations and the settlement package APCO
5 submitted to the City of North Las Vegas.

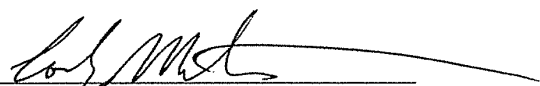
6 Therefore, the Court Orders as follows:

7 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Defendants'
8 Motion for Partial Summary Judgment is **DENIED**.

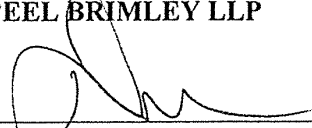
9 DATED this 31 day of August, 2017.

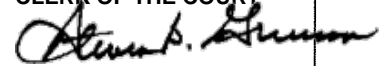
10 
11 DISTRICT COURT JUDGE *fu*

12 Approved as to Form and Content:
13 **MARQUIS AURBACH COFFING**

14 
15 Avece M. Higbee, Esq. (SBN 3739)
16 Cody S. Mounteer, Esq. (SBN 11220)
17 Neil M. Sansone, Esq. (SBN 13948)
18 10001 Park Run Drive
19 Las Vegas, Nevada 89145
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Attorneys for Defendants
APCO Construction and Safeco
Insurance Company of America

21 Submitted by:
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27 Henderson, NV 89074-6571
28 Phone: (702) 990-7272
Attorneys for Plaintiff
Helix Electric of Nevada, LLC



1 RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
2 CARY B. DOMINA, ESQ.
Nevada Bar No. 10567
3 **PEEL BRIMLEY LLP**
3333 E. Serene Avenue, Suite 200
4 Henderson, Nevada 89074-6571
Telephone: (702) 990-7272
5 Fax: (702) 990-7273
rpeel@peelbrimley.com
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7

8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 HELIX ELECTRIC OF NEVADA, LLC, a
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11 Plaintiff,

12 vs.

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17

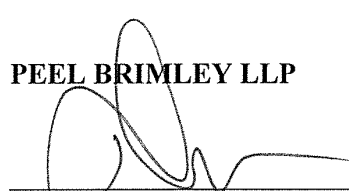
CASE NO.: A-16-730091-C
DEPT. NO.: XVII

NOTICE OF ENTRY OF ORDER

18 **PLEASE TAKE NOTICE** that an Order Denying Motion to Dismiss and Motion for
19 Fees and Costs entered on the 31st day of August, 2017 and electronically filed with the Court
20 on September 7, 2017, a copy of which is attached hereto.
21

22 DATED this 7th day of September, 2017.

23 **PEEL BRIMLEY LLP**

24 
25 Richard L. Peel, Esq. (SBN 4359)
26 Cary B. Domina, Esq. (SBN 10567)
3333 E. Serene Avenue, Suite 200
27 Henderson, NV 89074-6571
Phone: (702) 990-7272
Attorneys for Plaintiff
Helix Electric of Nevada, LLC
28

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

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 7th day of September, 2017, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF 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**;
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- ☐ emailed to all interested parties.

E-Service Master List

Helix Electric of Nevada LLC, Plaintiff(s) vs. APCO Construction, Defendant(s)

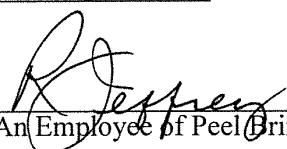
Marquis Aurbach Coffing


Contact

Avece M. Higbee, Esq.
Cody Mounteer, Esq.
Jennifer Case
Penny Williams

Email

ahigbee@maclaw.com
cmounteer@marquisaurbach.com
jcase@maclaw.com
pwilliams@maclaw.com


An Employee of Peel Brimley LLP



1 RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
2 CARY B. DOMINA, ESQ.
Nevada Bar No. 10567
3 **PEEL BRIMLEY LLP**
3333 E. Serene Avenue, Suite 200
4 Henderson, Nevada 89074-6571
Telephone: (702) 990-7272
5 Fax: (702) 990-7273
rpeel@peelbrimley.com
6 cdomina@peelbrimley.com
Attorneys for Helix Electric of Nevada, LLC

7
8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

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

11 Plaintiff,

12 vs.

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

16 Defendants.

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

ORDER DENYING:

(I) MOTION TO DISMISS; AND

(II) MOTION FOR FEES AND
COSTS

17
18 This matter came on for hearing May 17, 2017 before the Honorable Michael Villani in
19 Dept. 16 on Defendant's Motion to Dismiss Plaintiff's Claims Against Bond and
20 Countermotion for Fees and Costs of Motion. Cary B. Domina, Esq. of PEEL BRIMLEY LLP
21 appeared on behalf of Plaintiff, HELIX ELECTRIC OF NEVADA ("Helix" or "Plaintiff") and
22 Cody Munteer of MARQUIS AURBACH COFFING appeared on behalf of Defendants
23 APCO Construction and Safeco Insurance Company of America.

24 The Court having considered all of the pleadings and papers on file, and after review of
25 the pleadings on file and oral argument by counsel, this COURT DEFERRED its decision on
26 this matter and now rules as follows:
27
28

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1 1. In ruling upon a motion to dismiss, the court recognizes all factual allegations in
2 the complaint as true and draws all inferences in its favor. *Buzz Stew. LLC v. City of N. Las*
3 *Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

4 2. The Complaint should be dismissed under NRCP 12(b)(5) only if it appears
5 beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief. *Id.*
6 Allegations in the Complaint must be taken at face value and must be construed favorably in
7 the nonmoving party's behalf. *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 111 (1985).

8 3. To determine if a cause of action is sufficient to assert a claim for relief, the
9 Court should determine "whether the allegations give fair notice of the nature and basis of the
10 claim and the relief requested." *Ravera v. City of Reno*, 100 Nev. 68, 70, 675 P.2d 407, 408
11 (1984).

12 4. The instant Motion requires this Court to determine the date in which a claim is
13 to be made against a bond for a public works project known as the Craig Ranch Regional Park
14 Phase II project (the "Project").

15 5. Safeco, as surety and APCO as principal executed and delivered a labor and
16 material bond for said Project. It is undisputed that the City of North Las Vegas ("CNLV")
17 approved the final work on the Project on July 2, 2014.

18 6. Safeco argues that pursuant to NRS 339.055 Helix was required to commence
19 its action within one year from the date the claimant (Helix) performed the last of the labor or
20 furnished materials.

21 7. Giving Helix the benefit of the doubt, Safeco argues the last date to file such a
22 claim on the Bond would be July 2, 2015 and because Helix filed the present matter on January
23 12, 2016, it is barred as a matter of law from pursuing its claim under the Bond.

24 8. Helix argues that the Bond in question provides for a two-year time frame for
25 claims based on the language of the contract, thereby superseding the statute by agreement of
26 the parties and supports its claim by urging this Court to adopt the reasoning of *Royal*
27 *Indemnity Co. v. Special Service*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966).

28 9. The language of the Bond in dispute is the following:

1 “This bond shall insure [sic] to the benefit of any persons,
2 companies or corporations entitled to the claims under applicable
3 State law. This bond shall remain in effect until two (2) years after
4 the date of the final acceptance of the Work by the City Council.”

5 10. It is undisputed that NRS 339.005 provides that a claim under a bond must be
6 brought within one year. The first sentence in the quoted language “persons, companies or
7 corporations entitled to the claims under applicable State law” incorporates those entities
8 covered under NRS 339.035.

9 11. However, the second sentence of the bond language in question demonstrates a
10 clear intent by the parties to extend the claims period of the bond to two years. To support its
11 conclusion, the Court looks to the language “shall remain in effect until two (2) years after the
12 date of the final acceptance.”

13 12. The plain meaning of “in effect” is defined as “operating or functioning; in
14 force.” See TAKE EFFECT, Black's Law Dictionary (10th ed. 2014). Therefore, based on a
15 plain interpretation of the clause in question, the two-year language expands the contract, as
16 allowed under Royal for the following reasons.

17 13. The purpose of NRS 339.025 cannot be read in harmony with the two-year
18 claims provision contained on the face of the Bond. NRS 339.025(1)(b) states “*The bond must*
19 *be solely for the protection of claimants supplying labor or materials to the contractor to*
20 *whom the contract was awarded, or to any of his or her subcontractors, in the prosecution of*
21 *the work provided for in such contract.*” (emphasis added). Such language makes it clear that
22 the bond in question was only required for claims of labor or materials and for nothing else.

23 14. Therefore, the only parties who could make a claim to this bond would be those
24 who supply labor or materials and by statute, these parties would be bound to a one-year
25 Statute of Limitations period under NRS 339.055, which directly conflicts with the two-year
26 language on the face of the bond.

27 15. Because such a conflict exists, the Court finds that no other intent could have
28 existed, except for the drafter to have intended to extend the claims period in excess of the time
 allowed by statute. See generally, *Royal Indemnity Co. v. Special Service*, 82 Nev.

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

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2 P.2d 725 (1985), (Holding that bonds should be liberally construed to the benefit of
3 beneficiaries under the bond, as opposed to in favor a surety).

4 Therefore, the Court Orders as follows:

5 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Safeco's Motion
6 to Dismiss is **DENIED**; and

7 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Safeco's Motion
8 for Fees and Costs is also **DENIED**.

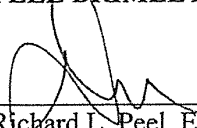
9 DATED this ____ day of August, 2017.

10
11 ~~DISTRICT COURT JUDGE~~

12 Approved as to Form and Content:
13 **MARQUIS AURBACH COFFING**

14
15 Avece M. Higbee, Esq. (SBN 3739)
16 Cody S. Mounteer, Esq. (SBN 11220)
17 Neil M. Sansone, Esq. (SBN 13948)
18 10001 Park Run Drive
19 Las Vegas, Nevada 89145
20 Phone: (702) 382-0711
Attorneys for Defendants
APCO Construction and Safeco
Insurance Company of America

21 Submitted by:
22 **PEEL BRIMLEY LLP**

23
24 
25 Richard L. Peel, Esq. (SBN 4359)
26 Cary B. Domina, Esq. (SBN 10567)
27 3333 E. Serene Avenue, Suite 200
28 Henderson, NV 89074-6571
Phone: (702) 990-7272
Attorneys for Plaintiff
Helix Electric of Nevada, LLC

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

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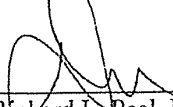
9 DATED this 3 day of August, 2017.

10 
11 DISTRICT COURT JUDGE *Fl*

12 Approved as to Form and Content:
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14 
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27 Henderson, NV 89074-6571
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Attorneys for Plaintiff
Helix Electric of Nevada, LLC