

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

Electronically Filed
Mar 19 2021 05:44 p.m.
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 VI

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 and Safeco Insurance Company of America*

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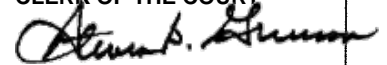
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16 Attorneys for Plaintiff Helix Electric of Nevada, LLC

10 **DISTRICT COURT**
11 **CLARK COUNTY, NEVADA**

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

13 Plaintiff,
14 vs.

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

17 Defendants.

**APPENDIX TO HELIX ELECTRIC
OF NEVADA, LLC'S OPPOSITION
TO APCO CONSTRUCTION'S
AND SAFECO INSURANCE
COMPANY OF AMERICA'S
MOTION IN LIMINE NO. 3 TO
PRECLUDE THE
INTRODUCTION OF EVIDENCE
RELATED TO HELIX'S
EXTENDED GENERAL
CONDITIONS AND MOTION IN
LIMINE NO. 4 TO PRECLUDE
ANY EVIDENCE OF HELIX'S
ACCOUNTING DATA OR JOB
COST REPORTS**

25 ///

26 ///

27 ///

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**APPENDIX TO HELIX ELECTRIC OF NEVADA, LLC'S OPPOSITION TO APCO
CONSTRUCTION'S AND SAFECO INSURANCE COMPANY OF AMERICA'S
MOTION IN LIMINE NO. 3 TO PRECLUDE THE INTRODUCTION OF EVIDENCE
RELATED TO HELIX'S EXTENDED GENERAL CONDITIONS AND MOTION IN
LIMINE NO. 4 TO PRECLUDE ANY EVIDENCE OF HELIX'S ACCOUNTING DATA
OR JOB COST REPORTS**

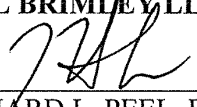
<u>Exhibit No.</u>	<u>Exhibit Description</u>	<u>Page Number(s)</u>
1	Copy of the Subcontract between Helix and APCO	HELIX Appendix Page Nos. 1 - 33
2	Copy of Helix's January 28, 2013 correspondence.	HELIX Appendix Page Nos. 34 - 35
3	Copy of Helix's June 19, 2013 correspondence.	HELIX Appendix Page Nos. 36 - 37
4	Copy of Helix's Initial Invoice for the Claim	HELIX Appendix Page Nos. 38 - 39
5	Copy of APCO's Change Order Request to CNLV.	HELIX Appendix Page Nos. 40 - 41
6	Copy of CNLV's rejection of APCO's Change Order Request	HELIX Appendix Page Nos. 42 - 43
7	Deposition Transcript of Joemel Llamado	HELIX Appendix Page Nos. 44 - 61
8	Copy of APCO's letter to Helix requesting additional documents for the Claim	HELIX Appendix Page Nos. 62 - 63
9	Copy of Helix's Revised Invoice for the Claim.	HELIX Appendix Page Nos. 64 - 67
10	Copy of APCO's COR 68.1 to CNLV.	HELIX Appendix Page Nos. 68 - 69
11	Copy of CNLV's rejection notice of COR 68.1	HELIX Appendix Page Nos. 70 - 71
12	Copy of Helix's Second Revised Invoice for the Claim.	HELIX Appendix Page Nos. 72 - 74
13	Copy of APCO's COR 93 to CNLV.	HELIX Appendix Page Nos. 75 - 76
14	Copy of CNLV's notice rejecting COR 93.	HELIX Appendix Page Nos. 77 - 78

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<u>Exhibit No.</u>	<u>Exhibit Description</u>	<u>Page Number(s)</u>
15	Copy of certain email exchanges between Mr. Fuchs and Mr. Pelan and a draft of the Promissory Note.	HELIX Appendix Page Nos. 79 – 84
16	Copy of APCO's COR 39.1.	HELIX Appendix Page Nos. 85 – 87
17	Copy of Change Order 50 wherein CNLV agreed to pay APCO its extended overhead costs.	HELIX Appendix Page Nos. 88 – 91
18	Copy of Exhibit 1 to Mr. Johnson's Deposition	HELIX Appendix Page Nos. 92 – 98
19	Portion of Project Daily Sign In Log, and Helix Daily Job Report	HELIX Appendix Page Nos. 99 – 101
20	Copy of APCO's First Request for Production of Documents	HELIX Appendix Page Nos. 102 - 106

Dated this 21st day of March, 2019.

PEEL BRIMLEY LLP



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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 29 day of March, 2019, I caused the above and foregoing document entitled **APPENDIX TO HELIX ELECTRIC OF NEVADA, LLC'S OPPOSITION TO APCO CONSTRUCTION'S AND SAFECO INSURANCE COMPANY OF AMERICA'S MOTION IN LIMINE NO. 3 TO PRECLUDE THE INTRODUCTION OF EVIDENCE RELATED TO HELIX'S EXTENDED GENERAL CONDITIONS AND MOTION IN LIMINE NO. 4 TO PRECLUDE ANY EVIDENCE OF HELIX'S ACCOUNTING DATA OR JOB COST REPORTS** to be served to the party(ies) and/or attorney(s) 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 to the parties identified below; and/or
- ☒ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____

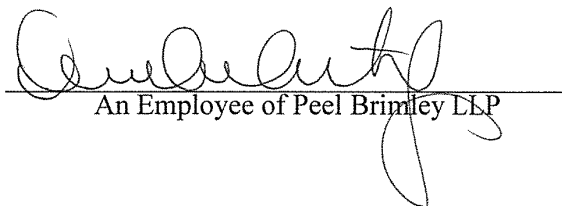

An Employee of Peel Brimley LLP

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

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JA808

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.

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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 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: U.P.

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.

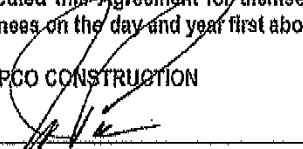
20.7 Contractor's rights and remedies under the Subcontract are not exclusive and Contractor shall have all other remedies available at law or in equity to enforce the Subcontract.

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 16

JA822

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

This Agreement includes the supply of all labor, materials, tools, equipment, liability, payroll, 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.

HELIX 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

JA823

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 man 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

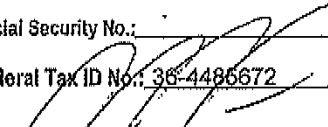
We have been requested by the Internal Revenue Service to comply with Regulation 1.604-1(d), which requires that we issue a 1099 Form on the compensation paid to you by APCO Construction.

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

JA825



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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New Mexico License #367103 • South Dakota License #EC2703 • Utah License #7114771-5501 • Wyoming License #G-34040

OCT. 26. 2011 11:49AM

NO. 5119 P. 2

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,
HELIX ELECTRIC

Darron Vanderford
Vice President, Estimating
DV/vr

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JA827



Nevada State Contractors Board

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 3270 Gateway Circle, Suite 100 Reno NV 89521 (775) 888-1141 Fax: (775) 888-1171 Nevada Board: (775) 888-1169
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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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**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**

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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**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**

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.

Indemnify 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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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%)"

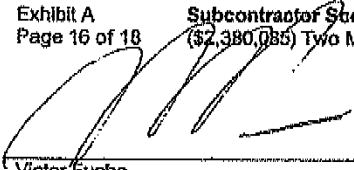


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HE JOB #161113**

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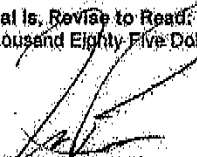
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FOR CRAIG RANCH REGIONAL PARK - PHASE II
HE JOB #161113**

Exhibit A
Page 16 of 18

Subcontractor Scope of Work The Contract Total is, Revised 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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JA839

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

JA845

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**Date:** _____

Expedition 50

By: _____
Joe Pelan**Date:** 9/5/13

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

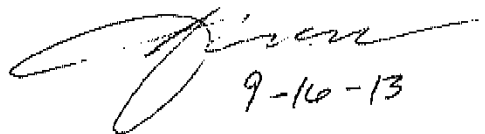
Contract Sum if Approved at this Value: \$28,512,054.00

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”

JOEMEL LLAMADO
HELIX ELECTRIC OF NEVADA, LLC v. APCO CONSTRUCTION, et al.

Page 1

DISTRICT COURT
CLARK COUNTY, NEVADA

HELIX ELECTRIC OF NEVADA,)	
LLC, a Nevada limited)	
liability company,)	
)	
Plaintiff,)	
)	Case No. A-16-7300091-C
)	Dept. No. XVII
vs.)	
)	
APCO CONSTRUCTION, a)	
Nevada corporation; SAFECO)	
INSURANCE COMPANY OF)	
AMERICA; DOES I through X;)	
and ROE BONDING COMPANIES I)	
through X,)	
)	
Defendants.)	
)	

DEPOSITION OF JOEMEL LLAMADO
LAS VEGAS, NEVADA
WEDNESDAY, MARCH 21, 2018
at 12:06 p.m.

Reported By: LISA MAKOWSKI, CCR 345, CA CSR 13400
JOB NO: 100675

DALOS Legal Services, LLC
702.260.0976

JA851

JOEMEL LLAMADO
HELIX ELECTRIC OF NEVADA, LLC v. APCO CONSTRUCTION, et al.

Page 2

1 DEPOSITION OF JOEMEL LLAMADO, taken at 3333
2 East Serene Avenue, Suite 200, Las Vegas, Nevada, on
3 Wednesday, March 21, 2018, at 12:06 p.m., before Lisa
4 Makowski, Certified Court Reporter, in and for the
5 State of Nevada.

6

7 APPEARANCES:

8 For Helix Electric of Nevada, LLC:

9 PEEL BRIMLEY LLP
10 BY: CARY B. DOMINA, ESQ.
3333 East Serene Avenue
Suite 200
11 Henderson, Nevada 89074
(702) 990-7272
12 Cdomina@peelbrimley.com

13 For APCO Construction:

14 MARQUIS AURBACH COFFING
15 BY: CODY S. MOUNTEER, ESQ.
10001 Park Run Drive
Las Vegas, Nevada 89145
16 (702) 382-0711
Cmunteer@maclaw.com

17

For the City of North Las Vegas:

18

19 CHRIS CRAFT, ESQ.
City of North Las Vegas
2250 Las Vegas Boulevard North
20 Suite 250
North Las Vegas, Nevada 89030
21 (702) 633-1230
Craftc@cityofnorthlasvegas.com.

22

23 Also Present: Joe Pelan

24

* * * * *

25

JOEMEL LLAMADO
HELIX ELECTRIC OF NEVADA, LLC v. APCO CONSTRUCTION, et al.

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JOEMEL LLAMADO
HELIX ELECTRIC OF NEVADA, LLC v. APCO CONSTRUCTION, et al.

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1 LAS VEGAS, NEVADA, WEDNESDAY, MARCH 21, 2018

2 12:06 p.m.

3 -o0o-

4

5 (The court reporter requirements under
6 Rule 30(b)(4) of the Nevada Rules of
7 Civil Procedure were waived.)

8

9 JOEMEL LLAMADO,

10 having been first duly sworn, did testify as follows:

11

12 EXAMINATION

13 BY MR. DOMINA:

14 Q. Morning, sir. My name is Cary Domina.
15 I'm an attorney with the law firm of Peel Brimley.
16 We are counsel for Helix Electric, a Nevada LLC.
17 Helix has pursued a claim or filed litigation
18 against APCO Construction and its surety company.

19 Were you aware of that, that there is
20 litigation?

21 A. Yes.

22 Q. Now, the litigation involves the project
23 known as the Craig Ranch Regional Park, Phase II.
24 During the deposition, I'm just going to refer to
25 that as the project. You'll understand that that's

JOEMEL LLAMADO
HELIX ELECTRIC OF NEVADA, LLC v. APCO CONSTRUCTION, et al.

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1 basically double-checking what he's doing and
2 overseeing what the inspector is doing.

3 Q. Right. Is there an unwritten rule --
4 because the -- I assume that the inspector you're
5 referring to could also be an inspector that's
6 inspecting a private project not related to the
7 City of North Las Vegas, but within the City of
8 North Las Vegas; correct?

9 A. The inspector that we have is -- they do
10 inspect private development as well, as well as
11 capital improvement projects. But this specific
12 inspector is a capital improvement inspector
13 working for this job.

14 Q. Okay. Meaning his specialty is public
15 works?

16 A. Public works.

17 Q. Then I'd like to go to paragraph 6. It
18 says, "APCO submitted invoices from Helix Electric
19 for extended general conditions."

20 I'm actually going to combine six and
21 seven, so hang on to six.

22 And then it says, "Seven. I personally
23 rejected those requests because they had no merit."

24 I wanted to get an understanding of what
25 that means, that those change order requests for

1 extended general conditions or those invoices had
2 no merit. What did you mean by that?

3 A. From Number 6, the submitted invoices
4 from Helix Electric was given to me in my trailer,
5 and combining that with I personally rejected those
6 because they had no merit, because they came from
7 Helix. The city only accepts change order requests
8 from the general contractor.

9 If they needed something to be submitted
10 to the city, they would, as every other
11 subcontractor would, submit to the general
12 contractor. The general contractor would then put
13 it in the same change order request that we spoke
14 about earlier, then submit that to the city as an
15 official submittal of a change request.

16 This that I received is -- I didn't
17 consider that to be a change order request because
18 it did not come from APCO, it came from Helix, the
19 subcontractor.

20 Q. When you say -- now I interrupted you.
21 Go ahead. Finish.

22 A. They would have to go through the proper
23 channels just like everybody else, so that I can
24 then receive it correctly through the process of
25 the change order request.

JOEMEL LLAMADO
HELIX ELECTRIC OF NEVADA, LLC v. APCO CONSTRUCTION, et al.

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1 Q. So when you say these invoices came from
2 Helix to City of North Las Vegas, was there someone
3 from Helix that approached you at the trailer and
4 delivered these invoices?

5 A. No. I believe it was the superintendent
6 from APCO who handed me that, but it did not have
7 the same cover letter or everything that I expected
8 from a change order. It just says these are from
9 Helix, these are the change orders. And I remember
10 browsing through it like this not thoroughly, but
11 just this, and I said, I cannot accept this, this
12 is from your subcontractor, give it back to them, I
13 only accept things from APCO.

14 Q. Okay.

15 MR. CRAFT: Joemel, if you can be more
16 careful in saying like this. It's hard for the
17 court reporter to translate.

18 THE WITNESS: Oh, I leafed through it
19 briefly. I don't know how to express that, and
20 like speed reading and just said, This is not
21 acceptable, you have to submit it to your
22 contractor, general contractor, who will then
23 submit it to me.

24 BY MR. DOMINA:

25 Q. Okay. As I show, as we go through some

1 the City of North Las Vegas reject that claim?

2 A. They would.

3 Q. Okay. Turn that over.

4 (Exhibit 11 was marked for
5 identification.)

6 BY MR. DOMINA:

7 Q. Joemel, you now have Exhibit 11 in front
8 of you. Could you just take a minute and flip
9 through it to see if it's documentation that looks
10 familiar to you.

11 A. Yes. Yes, this does look familiar to me.

12 Q. The first document we're looking at is an
13 e-mail from Lisa to you, and it says, "Joemel,
14 please see attached for your review and approval,"
15 and there appear to be at least two documents,
16 possibly three attached to that e-mail.

17 Do you see that?

18 A. Yes, I do.

19 Q. One of which is Change Order
20 Request 68.1. Now, this e-mail is dated
21 November 12, 2013, so that's a full month after
22 APCO and the City of North Las Vegas settled their
23 claims; correct?

24 A. That is correct.

25 Q. So if you turn to Bates number -- or the

JOEMEL LLAMADO
HELIX ELECTRIC OF NEVADA, LLC v. APCO CONSTRUCTION, et al.

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1 second page. You're already there, I think.

2 A. This one?

3 Q. No. I think you're on that page I was
4 looking at. The one right after the e-mail --

5 A. Okay.

6 Q. -- 117.

7 So this is Change Order Request 68.1.
8 This is kind of what I was talking about earlier.
9 What do you recognize this document to be?

10 A. A revision of 68.

11 Q. And a revision of what, sorry?

12 A. 68. I'm trying to find out what 68 is,
13 because normally when you have a .1, as we
14 mentioned before, it's a revision of a different
15 document. That's the same document that was
16 submitted back in -- it's dated 9/16/13.

17 Q. So this is APCO's change order request
18 sent on behalf of Helix; right?

19 A. That is correct.

20 Q. For the general conditions?

21 A. Correct.

22 Q. And again, as you testified, if APCO
23 submitted a change order request pertaining to
24 extended general conditions after that date that
25 the settlement agreement had happened, or had took

JOEMEL LLAMADO
HELIX ELECTRIC OF NEVADA, LLC v. APCO CONSTRUCTION, et al.

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1 place, you would have rejected it just as a matter
2 of course?

3 A. Yes.

4 Q. If you turn to -- there's a few documents
5 here. Basically I'll just scroll through them
6 quickly. If you go to Bates 118, so that's a
7 letter from Helix, this is a letter from Helix to
8 APCO basically identifying that there has been
9 further delays to the project and that they would
10 be seeking an adjustment to their claim for general
11 conditions. Do you see that?

12 A. I see it.

13 Q. Do you recall getting this document as
14 part of the documents that were e-mailed to you?

15 A. I would like to say yes, if it was
16 attached to the same e-mail string.

17 Q. Okay. And then there is the one after
18 that is an invoice. The one after the letter is an
19 invoice from Helix for 111,847?

20 A. Correct.

21 Q. And then behind that you'll see a kind of
22 a spreadsheet. It looks like a breakdown of
23 Helix's overall makeup of its general conditions.
24 Do you see that?

25 A. I see it.

JOEMEL LLAMADO
HELIX ELECTRIC OF NEVADA, LLC v. APCO CONSTRUCTION, et al.

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1 Q. And then the last document is your
2 response. This is that change management document
3 that you said is generated when a change order
4 request is rejected; right?

5 A. Correct.

6 Q. And here, if you look at -- and first of
7 all I should ask, are you again the author of this
8 document?

9 A. Yes, I am.

10 Q. And of the remarks section specifically?

11 A. I remember it because I remember missing
12 the date. And this time I had to make sure I put
13 the date that I dated it. The submittal dated
14 November 5th is rejected on November 13, because
15 the last time I had to hand-write the date because
16 this program was so archaic.

17 Q. Got you. So I want to focus on the
18 remarks here. It says, This is the second change
19 order request for Helix Electric's extended
20 overhead submittal. The first one was submitted on
21 September 9, 2013 and rejected on September 16,
22 2013. This submittal dated November 5th, 2013 is
23 rejected on November 13, 2013.

24 Again, what -- and this, in your remarks
25 here, do you specifically say why it's being

1 rejected?

2 A. Because it is the same submittal. This
3 is the second COR for Helix's extended overhead and
4 submittal. It is rejected. I don't see a reason
5 why it was rejected. It just says it's been, so...

6 Q. But you refer back to the first
7 rejection; right?

8 A. Right. Right.

9 Q. And what was the purpose of you doing
10 that?

11 A. Because it was -- it was from Helix, not
12 from -- from our contractor who we have a contract
13 with.

14 Q. Okay. So for the same reasons that it
15 was rejected the first time you were rejecting it
16 the second time, because of the contractual privity
17 concern?

18 A. Correct.

19 Q. And again, here I'm going to ask even
20 though Helix provided some backup or apparently
21 provided some backup with a breakdown, you didn't
22 specifically ask for that backup?

23 A. No, I did not.

24 Q. And you didn't reject this because there
25 wasn't sufficient backup, it was rejected for other

1 reasons?

2 A. For other reasons.

3 Q. Okay. And do you know if you also
4 rejected it because the city believed that it had
5 struck a deal with APCO and had settled claims for
6 extended overhead and costs? Do you know if that
7 was in your mind at the time?

8 A. I have no knowledge of what was going on
9 between APCO and Helix. It was rejected mostly
10 because it was not from my contractor, but from my
11 subcontractor.

12 Q. I must have misspoke, because from what
13 you said I did misspeak. What I meant to say was
14 do you know if at the time that you received this,
15 one of the bases for you rejecting it was also the
16 fact that the City of North Las Vegas and APCO had
17 reached a resolution on delay and disruption impact
18 damages to the project?

19 MR. CRAFT: Objection to form.

20 BY MR. DOMINA:

21 Q. Do you know if that was in your mind as
22 part of the reason, or was it just solely going
23 back to the outside the contract relationship?

24 A. In my -- in recollection of this, I
25 rejected it based on the same reason I rejected it

JOEMEL LLAMADO
HELIX ELECTRIC OF NEVADA, LLC v. APCO CONSTRUCTION, et al.

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1 (Exhibit 12 was marked for
2 identification.)

3 BY MR. DOMINA:

4 Q. Joemel, you now have Exhibit 12 in front
5 of you. Again, will you take just a few minutes to
6 scroll through it and tell me if you recognize this
7 packet of information?

8 A. Okay.

9 Q. So if you recall from the last exhibit we
10 were looking at, there was a letter from Helix to
11 APCO indicating that Helix would be seeking an
12 additional two months for their extended general
13 conditions and that they would submit that invoice.

14 Do you understand the documents that are
15 attached to this e-mail to be the backup or the
16 information that Helix said it would be providing
17 to APCO with respect to those two months?

18 A. Yes.

19 Q. Okay. You specifically recall receiving
20 this e-mail and package of information?

21 A. Yes, I do.

22 Q. All right. We're going to go through it
23 real quickly, the change order request. So the
24 second document, Bates 137, it's a Change Order
25 Request No. 93 from APCO to City of North Las Vegas

JOEMEL LLAMADO
HELIX ELECTRIC OF NEVADA, LLC v. APCO CONSTRUCTION, et al.

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1 for 26,304; correct?
2 A. Correct.
3 Q. And then behind that is an invoice from
4 Helix to APCO for that same amount?
5 A. That is correct.
6 Q. And then behind that document there is a
7 breakdown, but only including the last two months
8 of the project. Do you see that?
9 A. I see it.
10 Q. And so the one I want to talk about, the
11 document I want to focus on is the last document,
12 Bates 136, and again, were you the author of this
13 document?
14 A. Yes.
15 Q. Including the comments, the remarks
16 section?
17 A. Yes.
18 Q. And here it says this COR, this change
19 order request in the amount of 26,304 for Helix
20 Electric extended GCs is rejected on 12/4/2013.
21 Now, in this case you don't refer back to the first
22 and the second rejection. What was the basis for
23 rejecting it this time around?
24 A. It was already completed, the TIA was
25 already signed and we expected nothing more from --

JOEMEL LLAMADO
HELIX ELECTRIC OF NEVADA, LLC v. APCO CONSTRUCTION, et al.

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1 from APCO. So we deemed the project to be complete
2 and therefore this has no basis, and so it was
3 rejected.

4 Q. So again, going back to the same, same
5 reason, it was outside the contract, and at this
6 point it had already been resolved, that issue had
7 been resolved with APCO?

8 A. Correct.

9 Q. Okay. Again, you never had any
10 indication or any thought that Helix needed to
11 provide additional support or backup to justify
12 these amounts?

13 A. No.

14 Q. Okay. And in fact, had Helix provided
15 you with additional backup, that would have in no
16 way changed your position to reject this change
17 order request; correct?

18 A. That is correct.

19 Q. All right. If you just give me a minute
20 here, I've got one last change order, or one last
21 document I want to show you. You can put that one
22 aside.

23 MR. DOMINA: This should be 13.

24 (Exhibit 13 was marked for
25 identification.)

JOEMEL LLAMADO
HELIX ELECTRIC OF NEVADA, LLC v. APCO CONSTRUCTION, et al.

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1 REPORTER'S DECLARATION

STATE OF NEVADA)

2 COUNTY OF CLARK)

I, Lisa Makowski, CCR No. 345, declare as
3 follows:

4 That I reported the taking of the deposition of
5 the witness, JOEMEL LLAMADO, commencing on Wednesday,
6 March 21, 2018, at the hour of 12:06 p.m.

7 That prior to being examined, the witness was by
8 me duly sworn to testify to the truth, the whole
9 truth, and nothing but the truth; that, before the
10 proceedings' completion, the reading and signing of
11 the deposition has been requested by the deponent or
12 a party.

13 That I thereafter transcribed said shorthand
14 notes into typewriting and that the typewritten
15 transcript of said deposition is a complete, true and
16 accurate transcription of said shorthand notes taken
17 down at said time.

18 I further declare that I am not a relative or
19 employee of any party involved in said action, nor a
20 person financially interested in the action.

21 Dated at Las Vegas, Nevada this 5th day of
22 April, 2018.

23

24

25


Lisa Makowski, CCR 345



EXHIBIT “8”



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

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

JA869

EXHIBIT 9



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 16113M-001
Craig Ranch Park Phase II

Dear Mr. Pelan:

Attached please find the requested back-up documentation requested to support our invoice 16113M-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

3978 E. Sunset Rd., Suite 2 • Las Vegas, NV 89120 • Tel: (702) 732-1188 Fax: (702) 732-1493
Nevada License #0058810 • #0073392 • #0073455
Arizona License #RO0232191 & #1 • Utah License #7314771-3501



Helix Electric
CONSTRUCTORS - UNDERWRITERS

MISCELLANEOUS INVOICE # 161113M-001R1

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

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

PROJECT NAME: Craig Ranch Regional Park
Phase II

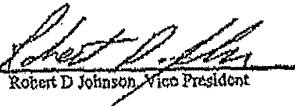
DESCRIPTION: Extended Overhead

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&E 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

JA872

	January	February	March	April	May	June	July	August
Project Manager	\$ 2,600.00	\$ 5,200.00	\$ 5,200.00	\$ 5,200.00	\$ 5,200.00	\$ 5,200.00	\$ 5,200.00	\$ 5,200.00
Project Engineer	\$ 901.90	\$ 901.90	\$ 901.90	\$ 901.90	\$ 901.90	\$ 901.90	\$ 901.90	\$ 901.90
Superintendent	\$ 3,200.00	\$ 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	\$ 195.00	\$ 165.00	\$ 165.00	\$ 165.00
Project Fuel	\$ 457.24	\$ 1,239.11	\$ 680.68	\$ 603.30	\$ 256.19	\$ 353.42	\$ 373.75	\$ 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	\$ 110.00			
Office Supplies								
Storage Cones/ies	\$ 110.00	\$ 220.00	\$ 110.00	\$ 110.00	\$ 110.00	\$ 110.00	\$ 110.00	
Forklift/s		\$ 3,323.48	\$ 3,425.82					
Small Tools	\$ 379.02	\$ 555.09	\$ 501.40	\$ 414.15	\$ 292.96	\$ 174.77	\$ 214.52	\$ 166.83
Consumables								
Total	\$ 6,912.66	\$ 17,980.58	\$ 17,190.28	\$ 15,599.76	\$ 15,500.05	\$ 12,724.99	\$ 15,465.21	\$ 12,395.87

\$113,847

Grand total for extended overhead for months January 29, 2013 - August 30, 2013

Project Manager Based on 4 Hours a Day @ \$65/Hr.

Superintendent @ 4 Hours a Day \$70/Hr.

EXHIBIT 10

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 (11/13/13 - 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:** _____

Exposition 6

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

JA875

EXHIBIT 11

City of North Las Vegas

Engineering Services Division
2250 N Las Vegas Boulevard, Ste 610
North Las Vegas, NV 89036

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 12



Helix Electric
CONSTRUCTORS • ENGINEERS

MISCELLANEOUS INVOICE # 161113M-002

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

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

PROJECT NAME: Craig Ranch Regional Park
Phase II

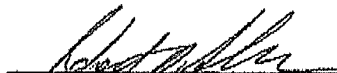
DESCRIPTION: Extended Overhead

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									
Wire Trailer/s									
Office Supplies									
Storage Connex/es									
Forklift/s									
Small Tools	\$ 174.77	\$ 238.52							
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 13

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 14

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:** 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	IDL
		Estimated	Quoted	Negotiated	Final		
Time Change:		0	0	0	0		
Values:		\$0.00	\$0.00	\$0.00	\$0.00		

Commitment:**Remarks:**

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

EXHIBIT 15

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.



HELIX ELECTRIC
CONSTRUCTORS • ENGINEERS

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.



HELIX ELECTRIC
CONSTRUCTORS • ENGINEERS

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 16

APCO Construction**CHANGE ORDER REQUEST**

No. 00039.1

44 W. Mayflower
North Las Vegas, NEVADA 89030Phone: 702-734-0198
Fax: 702-734-0396

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	\$80,400.00

Unit Cost: \$1,090,066.50

Unit Tax: \$0.00

Total: \$1,090,066.50

APPROVAL:By: _____
Joemel Llamado

Date: _____

By: _____
Joe Pelan

Date: 5/9/2013

Exposition 39

JA892



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

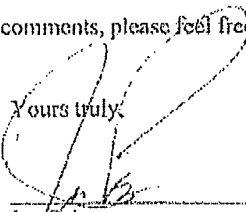
RE: CRAIG RANCH COR #39.1 & TIA #2

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

JA893

EXHIBIT 17



CONSTRUCTION CONFLICT AUTHORIZATION NO. 00050

Engineering Services Division Phone: 633-1230
2250 N Las Vegas Boulevard, Suite 100 Fax: 642-0390
North Las Vegas, NV 89030 TDD: (800) 326-6868 E-Mail: ilamadoj@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 and any and all indirect costs, and time adjustment to perform the above described change. All other costs are non-compensable.

Accepted By:

APCO Construction

Joe Pelan

Date:

10/10/13

Accepted By:

City of North Las Vegas

Manager

Construction Manager

Date:

10/15/13

10/16/13

File No.: 10294

Issue File:

Page 1 of 1

L.B. 0003

JA895

Mayor
John J. Lee

Interim City Manager
Jeffrey L. Buchanan

Council Members
Anita G. Wood
Patricia A. Gaynes-Brown
Wade W. Wagner
Lance E. Burton



Your Community of Choice

Department of Public Works – Dr. Qiong Liu, P.E., P.T.O.E.
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 110 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 26, 2013, for a total amount of (\$560,724.16) based on the following evaluation:

Bid Item	Description	Contr Days	Qty	Units	Unit Price (\$)	Daily Price (\$) (365 Days)
200.05	Dust Control & Track-Out	355	1.0	LS	\$ 65,000.00	\$ 180.60
200.06	SWPPP Control	355	1.0	LS	\$ 10,000.00	\$ 27.40
200.08	General Conditions	365	1.0	LS	\$ 636,960.00	\$ 1,760.68
200.09	Site Security	365	1.0	LS	\$ 140,898.00	\$ 410.68
200.10	Home Office Overhead	365	1.0	LS	\$ 384,352.00	\$ 998.33
	Total				\$ 1,433,910.00	\$ 3,337.64

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 26, 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.

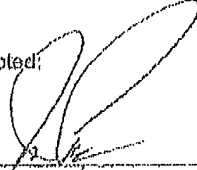
It is also understood that APCO will forgo any claims for delays, disruptions, general conditions and overtime costs associated with the weekend work previously performed and presently ongoing to achieve the above dates and for any other claim, present or future, that may occur on the project.

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

EXHIBIT 18



HELIX ELECTRIC
CONSTRUCTORS • ENGINEERS

INVOICE # 161113-015
CUSTOMER # 001613

APCO Construction
104 W Mayflower
North Las Vegas, NV 89032
ATTN: Joe Pelan

INVOICE DATE: 4/19/2013

PERIOD THRU: 4/30/2013

OUR JOB NO.: 161113

JOB NAME: Craig Ranch Regional Park - Phase II

YOUR JOB NO.: 193-6

ORIGINAL CONTRACT		2,380,085.20
CHANGE ORDER THROUGH #		(77,525.00)
CONTRACT AMOUNT TO DATE		2,302,560.20
GROSS BILLING	94%	2,155,540.20
PREVIOUSLY BILLED		2,113,540.20
GROSS CURRENT PERIOD		42,000.00
RETENTION	5%	2,100.00
NET AMOUNT DUE THIS PERIOD		39,900.00
OUTSTANDING FROM PRIOR PERIOD	Inv #161113-013	49,875.00
	Inv #161113-014	68,115.00
TOTAL AMOUNT DUE		157,890.00

Pursuant to B & P code section 7108.5 a penalty of 2% per month of the amount owed, plus attorney's fee 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 Rd., Suite 9 • Las Vegas, NV 89120 • Tel: (702) 732-1188 Fax: (702) 732-4386
Nevada License #0053810 • #0073392 • #0073455 • Arizona License #ROC232191 K-11 • Idaho License #005986 • Montana License #2412
New Mexico License #357103 • North Dakota License #41660 • South Dakota License #EC2703 • Utah License #7314771-5501 S200 • Wyoming License # C-24040



JA899

APPLICATION AND CERTIFICATE FOR PAYMENT

TO (Owner):

APCO Construction
104 W Mayflower
North Las Vegas, NV 89032

PROJECT:

Craig Ranton Regional Park - Phase II
1
PERIOD TO: 4/30/2013
PROJECT NOS 193-6

AIA DOCUMENT G702

Page 1 of 2

FROM:
(Contractor)
Helix Electric
3078 E. Sunset Rd., Ste#9
Las Vegas, NV 89120

VIA (ARCHITECT):

CONTRACT DATE:

Distribution to:
OWNER
ARCHITECT
CONTRACTOR

CONTRACT FOR

CONTRACTOR'S APPLICATION FOR PAYMENT

Application made for Payment, as shown below, in connection with the Contract.
Continuation Sheet, AIA Document G703, is attached.

ORIGINAL CONTRACT SUM

2. Net change by Change Orders

3. CONTRACT SUM TO DATE (Line 1+2)

4. TOTAL COMPLETED & STORED TO DATE

(Column G on G703)

5. RETAINAGE:

a. 10% of Completed Work

b. 10% of Stored Material

(Column D + E on G703)

(Column F on G703)

Total Retainage (Line 5a + 5b or

Total in Column I of G703)

6. TOTAL EARNED LESS RETAINAGE

(Line 4 less Line 5 Total)

7. LESS PREVIOUS CERTIFICATES FOR PAYMENT

(Line 6 from prior Certificate)

8. CURRENT PAYMENT DUE

9. BALANCE TO FINISH, PLUS RETAINAGE

(Line 3 less Line 6)

CHANGE ORDER SUMMARY	ADDITIONS	DEDUCTIONS
Total Changes approved in previous months by Owner	\$	
Total Approved this Month		
TOTAL \$	\$0.00	

\$ 2,380,085.20	\$ 107,777.01
(77,525.00)	
\$ 2,302,560.20	
\$ 2,155,540.20	
\$ 107,777.01	
\$ 2,047,763.19	
\$ 2,007,863.19	
\$ 33,900.00	
\$ 254,797.01	

The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.

By:

Robert D. Johnson, Senior Vice President

Date: 4/19/2013

State Of: NEVADA
County Of: CLARK

Subscribed and sworn to before me this 19th day of April, 2013

Notary Public
Edna K. Bennett

My Commission Expires: 4/19/2014



ARCHITECT'S CERTIFICATE FOR PAYMENT

In accordance with the Contract Documents, based on on-site observations and the data comprising the above application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

AMOUNT CERTIFIED.....

\$39,900.00

(Attach explanation if amount certified differs from the amount applied for, initial all figures on this Application and on the Continuation Sheet that are changed to CONTRACTOR.)

By:

This Certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the

benefit to any rights of the Owner or Contractor under this Contract.

CONTINUATION SHEET

AIA DOCUMENT G702

Page 2 of 2

Contractor's signed Certification and Certificate for Payment, containing
In tabulations below, amounts are stated to the nearest dollar.
Use Column 1 on Contracts where variable retainage for line items may apply.

Application Number: 161113-015
Application Date: 4/19/2013
Period To: 4/30/2013
Architect's Project No:

ITEM NO.	DESCRIPTION OF WORK	SCHEDULED VALUE	WORK COMPLETED		MATERIALS PRESENTLY STORED (NOT IN D OR E)	TOTAL COMPLETED AND STORED TO DATE (D + E + F)	% (G / C)	BALANCE TO FINISH (C - G)	RETAINAGE
			FROM PREVIOUS APPLICATION (D + E)	THIS PERIOD					
1	Mobilization	45,000.00	45,000.00			45,000.00	100.00%		2,250.00
2	Submittals	17,480.00	17,480.00			17,480.00	100.00%		874.00
3	Demo	24,000.00	17,800.00			17,800.00	83.31%		880.00
4	NVE	65,000.00	65,000.00			65,000.00	100.00%		3,250.00
5	Cemetry	35,000.00	35,000.00			35,000.00	100.00%		1,750.00
6	Site Underground Conduit and Boxes	195,000.00	191,500.00			193,500.00	98.23%		9,675.00
7	Contraintment Conduit and Boxes	180,000.00	180,000.00			180,000.00	100.00%		9,000.00
8	Parking Lots Conduit and Boxes	180,000.00	180,000.00			180,000.00	100.00%		9,000.00
9	Signs underground Conduit and Boxes	180,000.00	180,000.00			180,000.00	100.00%		9,000.00
10	Feeder Wire Installation	110,000.00	105,228.00			108,220.00	95.66%		4,772.00
11	Site Branch Wire Installation	85,000.00	81,000.00			83,000.00	95.29%		4,000.00
12	Parking Lots Branch Wire	61,200.00	61,200.00			61,200.00	100.00%		3,060.00
13	Sports areas Branch Wire	75,000.00	75,000.00			75,000.00	100.00%		3,750.00
14	Synthetic material	110,000.00	110,000.00			110,000.00	100.00%		5,500.00
15	Switchgear Installation	55,000.00	55,000.00			55,000.00	100.00%		2,750.00
16	Restroom Rough In	25,000.00	25,000.00			25,000.00	100.00%		1,250.00
17	Restroom Finish	15,000.00	15,000.00			15,000.00	100.00%		750.00
18	Integration Building Rough In	35,000.00	35,000.00			35,000.00	100.00%		1,750.00
19	Integration Building Finish	25,000.00	25,000.00			25,000.00	100.00%		1,250.00
20	Site Lighting Installation	55,000.00	55,000.00			55,000.00	100.00%		2,750.00
21	Parking Lot Lights Installation	75,000.00	75,000.00			75,000.00	100.00%		3,750.00
22	Spots Lighting Installation	95,000.00	95,000.00			95,000.00	100.00%		4,750.00
23	Alternates 2 Conduit and Boxes	15,000.00	15,000.00			15,000.00	100.00%		750.00
24	Alternates 2 Wire	20,000.00	20,000.00			20,000.00	100.00%		1,000.00
25	Alternates 2 Lighting Installation	15,000.00	15,000.00			15,000.00	100.00%		750.00
26	Alternates 3 Rest Rooms Rough In	10,000.00	10,000.00			10,000.00	100.00%		500.00
27	Alternates 3 Rest Rooms Finish	10,000.00	10,000.00			10,000.00	100.00%		500.00
28	Alternates 3 Parking Lot Conduit & Boxes	25,000.00	25,000.00			25,000.00	100.00%		1,250.00
29	Alternates 3 Parking Lighting Installation	115,000.00	115,000.00			115,000.00	100.00%		5,750.00
30	Alternates 4 Conduit and Boxes	20,000.00	20,000.00			20,000.00	100.00%		1,000.00
31	Alternates 4 Wire	25,000.00	25,000.00			25,000.00	100.00%		1,250.00
32	Alternates 4 Lighting Installation	100,000.00	100,000.00			100,000.00	100.00%		5,000.00
33	Alternates 6 NVE	23,585.20	23,585.20			23,585.20	100.00%		1,179.26
34	General Conditions	108,040.00	108,040.00			108,040.00	100.00%		5,402.00
35									
36									
37									
Original Contract Total		2,580,000.00	2,103,085.20	476,914.80		2,140,000.00	83.33%	235,000.00	1,076,914.80

PAY FOR OFFSETS CAUSED BY BOND COSTS TO LINE 302

A	B	C	D		E	F	G	H	I
ITEM NO.	DESCRIPTION OF WORK	SCHEDULED VALUE	FROM PREVIOUS APPLICATION (D + E)	THIS PERIOD	MATERIALS PRESENTLY STORED (NOT IN D OR E)	TOTAL COMPLETED AND STORED TO DATE (D + E + F)	% (G / C)	BALANCE TO FINISH (C - G)	RETAINAGE
Change Orders									
Change Order #1		10,475.00	10,475.00			10,475.00	100.00%	-88,000.00	523.75
Change Order #2		-88,000.00							
Change Order Total									
		-77,525.00	10,475.00			10,475.00		-88,000.00	523.75
Revised Contract Total									
		2,302,550.20	2,113,540.20	42,000.00		2,155,640.20	93.81%	147,020.00	101,773.01



**CONDITIONAL WAIVER AND RELEASE
UPON PROGRESS 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:	161113-015
Payment Amount:	\$39,900.00


Upon receipt by the undersigned of a check in the above referenced Payment Amount payable to the undersigned, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release and the undersigned shall be deemed to waive 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 to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. Before any recipient of the document relies on it, he should verify evidence of payment to the undersigned. The undersigned warrants that he either has already paid or will use the money he receives from this progress 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: 04/19/13

Helix Electric

By:


Robert D. Johnson,

Its:

Senior Vice President



**CONDITIONAL WAIVER AND RELEASE
UPON PROGRESS 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:	Application #15
Payment Amount:	\$42,000.00

Upon receipt by the undersigned of a check in the above referenced Payment Amount payable to the undersigned, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release and the undersigned shall be deemed to waive 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 to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. Before any recipient of the document relies on it, he should verify evidence of payment to the undersigned. The undersigned warrants that he either has already paid or will use the money he receives from this progress 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: 08/14/13

Helix Electric

By:

Its:

ROBERT D. JOHNSON
Senior Vice President

EXHIBIT 19

EXHIBIT 20

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

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7 *Attorneys for Plaintiff*
8 *HELIX ELECTRIC OF NEVADA, LLC*

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

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

12 Plaintiff,

13 vs.

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

18 Defendants.

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

**PLAINTIFF'S RESPONSES TO
DEFENDANTS SECOND SET OF
REQUESTS FOR PRODUCTION OF
DOCUMENTS**

19 Pursuant to Nev. R. Civ. P. 34, Plaintiff, HELIX ELECTRIC OF NEVADA, LLC
20 ("Helix"), by and through its attorneys, PEEL BRIMLEY LLP, responds to Defendants'
21 Second Set of Requests for Production of Documents below. Plaintiff reserves its right to
22 supplement any and all responses as additional information becomes known:

23 **GENERAL OBJECTIONS**

24 These general objections and caveats are applicable to each and every document
25 request, unless otherwise specified and are incorporated into each response as though set forth
26 in full. These responses are made solely for the purpose of this action.

27 ///

28 ///

1 1. Each response is subject to all objections as to competence, relevance,
2 materiality, propriety, admissibility, and exclusion of any statement herein, as if any portion of
3 the requests were asked of, or if any statement contained herein was made by a witness present
4 and testifying in court, all of which objections and grounds are reserved and may be interposed
5 at the time of trial.

6 2. The responses contained herein are based upon information presently known and
7 ascertained by Plaintiff. However, Plaintiff has not yet completed its investigation of all the
8 circumstances relating to this dispute and has not completed discovery or preparation for trial.
9 Plaintiff is unable to produce documents that are not in its possession. Accordingly, the
10 responses herein are without prejudice to utilizing subsequently obtained discovery or recalled
11 documents or information; and Plaintiff reserves the right to amend, add to, delete from, or in
12 any other manner modify these responses after it has completed its discovery and investigation
13 efforts and has ascertained all relevant facts and documents.

14 3. Plaintiff objects to each request (and any portion thereof) to the extent that it
15 calls for information and/or documents protected from discovery by the attorney-client
16 privilege and/or work product doctrine. Plaintiff's attorneys join in this objection to the extent
17 that the right to protect items from discovery pursuant to the "work product" doctrine belongs
18 to said attorneys.

19 4. Plaintiff reserve the right to make any and all evidentiary objections to the
20 introduction of any of these responses and/or documents into evidence at the trial of this
21 proceeding or otherwise.

22 5. Plaintiff further objects to all requests on the grounds they are burdensome,
23 vague, ambiguous, unintelligible, uncertain, incomprehensible, compound, oppressive,
24 intrusive of the constitutional right of privacy of Plaintiff and/or third parties, overbroad,
25 irrelevant, and/or not reasonably calculated to lead to the discovery of admissible evidence,
26 and/or fail to identify the documents requested with reasonable or adequate particularity.

27 ///

28 ///

RESPONSES

REQUEST FOR PRODUCTION NO. 12:

Please produce and identify all of Helix's accounting documents for the Craig Ranch Park, e.g., bids, invoices, payment requests, submissions, requests for payment, checks, lien releases, etc.

RESPONSE TO REQUEST FOR PRODUCTION NO. 12:

Bids – *See Plaintiff's Initial Disclosures identified as HEL000224.*

Invoices/Payment Requests/Request for Payment – *See Plaintiff's Initial Disclosures identified as HEL000381, 401, 406,407, 410-412, 434, 437-438, 464-465, 469, 473, 485-486, 488, 490-492.*

Checks – *See Plaintiff's Initial Disclosures identified as HEL000380.*

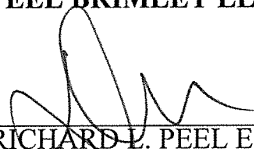
Lien Releases – *See Plaintiff's Initial Disclosures identified as HEL000379, 405, 427, 428, 436,468 and 489.*

Change Orders – *See Plaintiff's Initial Disclosures identified as HEL000403, 429, 430,431, 432, 433, 466, and 487.*

Plaintiff specifically reserves the right to supplement its Responses to add relevant documents, if subsequent information and investigation so warrants.

Dated this 7 day of December, 2017.

PEEL BRIMLEY LLP



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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 7th day of December, 2017, I caused the above and foregoing document, **PLAINTIFF'S RESPONSES TO DEFENDANTS SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**, to be served as follows:

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

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

E-Service Master List For Case

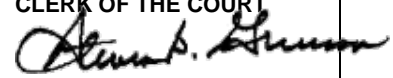
Helix Electric of Nevada LLC, Plaintiff(s) vs. APCO Construction, Defendant(s)

Marquis Aurbach Coffing

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An employee of PEEL BRIMLEY, LLP



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

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

v.

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

Defendants.

Case No.: A-16-730091-C

Dept. No.: XVII

**APCO CONSTRUCTION, INC. AND
SAFECO INSURANCE COMPANY OF
AMERICA'S REPLY IN SUPPORT OF:**

**MOTION IN LIMINE NO. 3 TO
PRECLUDE THE INTRODUCTION OF
EVIDENCE RELATED TO HELIX'S
EXTENDED GENERAL CONDITIONS**

AND

**MOTION IN LIMINE NO. 4 TO
PRECLUDE ANY EVIDENCE OF
HELIX'S ACCOUNTING DATA OR JOB
COST REPORTS**

AND ALL RELATED ACTIONS.

APCO Construction, Inc. ("APCO"), by and through its attorneys, Fennemore Craig, P.C., hereby files this Reply in Support of its Motion in Limine No. 3 to Preclude the Introduction of Evidence Related to Helix's Extended General Conditions and Motion in Limine No. 4 to Preclude any Evidence of Helix's Accounting Data including Job Cost Reports

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///

1 (“Reply”). This Reply is supported by the attached memorandum of points and authorities, all
2 exhibits attached hereto and all papers and pleadings on file herein.

3 Dated this 8th day of April, 2019.

4 By: /s/ Brandi M. Planet
5 John Randall Jefferies, Esq., NV Bar No. 3512
6 Brandi M. Planet, Esq., NV Bar No. 11710
7 300 S. 4th Street, Suite 1400
8 Las Vegas, NV 89101
9 *Attorneys for APCO Construction, Inc.*
10 *and Safeco Insurance Company of America*

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. INTRODUCTION**

13 If Helix was compensably delayed, it has to prove the actual costs it incurred due to the
14 delay. Billing for costs that were not incurred is fraud. Helix essentially admits that it has no
15 job cost accounting records to support its extended project overhead, which is the same thing as
16 general conditions in the construction industry. In fact, Helix brazenly admits that “the extended
17 overhead costs were billed on a set amount per day basis, irrespective of the amount of time
18 spent by any Helix employee on the job . . .”¹ and “that Helix’s extended overhead costs are not
19 directly tied to costs listed in Helix’s Job Cost Reports.”² If there are no increased supported
20 costs it is fraud. That is why APCO was asking for the Job Cost Report.

21 For the reasons set forth in the Motion, as well as those set forth below, APCO
22 respectfully requests that this Court enter an order precluding evidence relating to Helix’s
23 extended overhead/general conditions claim or in the alternative bind Helix to the existing
24 testimony. APCO also requests that Helix be prohibited from utilizing incomplete copies of job
25 cost reports during trial because APCO has not had an opportunity to fully analyze Helix’s costs
26 to determine whether its claim for extended general conditions is valid.

27 **II. RESPONSE TO STATEMENT OF FACTS**

28 Helix’s project history clearly is not relevant to the issues set forth in APCO’s Motion. In

¹ Helix Response, p. 15, ln. 13.

² Helix Response, p. 16, ln. 26.

1 the interest of brevity, APCO incorporates by reference the facts set forth in APCO's Omnibus
2 Motion in Limine filed on July 20, 2018 and in its Reply in Support of Omnibus Motion in
3 Limine filed on November 21, 2018. APCO further disputes most of Helix's factual contentions
4 in the opposition, which simply are not relevant.

5 Critically, APCO noticed the deposition of Helix's person most knowledgeable, setting
6 out seven topics for the corporate designee to be prepared to discuss. *See*, Exhibit 1 to the
7 Motion. The notice requested that the witness be prepared to discuss Helix's claimed damages as
8 they related to "Helix's general extended conditions." This topic clearly included Helix's extend
9 project overhead and Helix never objected to any deposition topic.³ Helix understood the
10 reference to general conditions.

11 During the deposition, APCO tried various lines of questioning to determine how Helix
12 calculated its extended general conditions damages. Despite two corporate attempts, Helix could
13 not answer the questions. Further, both deponents admitted to little or no preparation on the
14 topics:

15 Q. Okay. [Mr. Pritzel] Did you take any steps to investigate any topics on the
16 deposition notice for today?

17 A. No.⁴

18 Mr. Johnson, who was billed the damages PMK, was no better:

19 Q. Okay. What steps did you take to investigate the topics in the notice
20 for today's depositions?

21 A. Basically just read some of the paperwork transcripts that were
22 provided from Ray's testimony, or not testimony, but deposition, and
23 basically the filings on the case.

24 ***

25 Q. Okay. Did you take any steps to review any corporate records?

26 A. **Not in preparation for this**, but recently went through some of the
27 records at the request for our attorney through you for some documents
28 related to some equipment lists. So I went back through everything on

29 ³ "[T]he description of the scope of the deposition in the notice as the minimum about which the
30 witness must be prepared to testify, not the maximum." *Detoy v. City & Cty. of San Francisco*,
196 F.R.D. 362, 366 (N.D. Cal. 2000).

31 ⁴ See, Exhibit 3 to the Motion, Deposition of Eric Rainer Pritzel at 12:6-9.

1 that, but just specifically for that.⁵

2 He clearly did not investigate a familiarize himself with Helix's damages.

3 Helix argues that APCO should have asked Mr. Johnson whether he read through any
4 project records rather than corporate records because his answer would have been different. This
5 argument ignores that APCO asked a very broad question about what Mr. Johnson did to prepare
6 for the deposition topics to which he responded that he only looked at a deposition transcript and
7 certain pleadings—not project records. Mr. Johnson reviewed very little and certainly nothing
8 that would have helped him answer questions related to Helix's damages—the very thing APCO
9 has tried in vain to examine through discovery.

10 Interestingly, when APCO initially asked about the corporate records, the deponent
11 mentioned he looked at "equipment lists", so clearly the deponent understood that corporate
12 records went beyond the "corporate compliance type documents" Helix now argues is meant by
13 "corporate records". APCO needed to ask no further questions to uncover just how unprepared
14 Mr. Johnson was for the deposition.

15 APCO does not have sufficient information as to how Helix calculated its actual delay
16 costs. There is no expert testimony and only partial documentation for APCO to analyze. In fact,
17 the only thing Helix provides in support of its extended general conditions damages is a one
18 page letter noting daily costs that do not appear to be supported by Helix's partial Job Cost
19 Report.

20 Helix should not be permitted to benefit when its deponents were so unprepared. And
21 Helix should further not be permitted to provide yet another witness to make up for the lack of
22 preparation of the other deponents. Helix and counsel have now had two opportunities to
23 provide a prepared witness. APCO's questions were direct and appropriate. Both witnesses
24 admitted that they looked at very little, and certainly did not look at anything related to the
25 extended actual costs. It is not APCO's obligation to prepare Helix's witnesses, especially when
26 the notice clearly referenced "your claimed damages against APCO."

27 ⁵ See, Exhibit 4 to the Motion, Deposition of Robert Johnson at 7:3-9, 7:19-25 (emphasis added).
28

III. LEGAL ARGUMENT

A. Helix produced two unprepared witnesses for deposition.

APCO's Motion is premised on the fact that Helix presented not one, but two equally unprepared witnesses for deposition. Both witnesses admitted under oath that they did little to nothing to prepare. It was Helix's obligation to prepare and produce competent and prepared witnesses.

At this late stage, Helix should not be permitted to produce a third witness to rehabilitate the prior two. Helix has simply ignored its discovery obligations. If there were other documents that would have helped the testimony, as Helix alleges in its opposition, it is curious that neither deponent reviewed them. "The fact that an organization no longer has a person with knowledge on the designated topics does not relieve the organization of the duty to prepare a Rule 30(b)(6) designee" and the corporation must still prepare the designee "to the extent matters are reasonably available, whether from documents, past employees, or other sources." *Great Am. Ins. Co. of New York v. Vegas Const. Co.*, 251 F.R.D. 534, 539 (D. Nev. 2008)(emphasis added).⁶

"Producing an unprepared witness is tantamount to a failure to appear." *U.S. v. Taylor*, 166 F.R.D. 356, 360 (M.D.N.C.1996). *See also, Great Am. Ins. Co. of New York*, which similarly relied on *Taylor* as part of its analysis. A "failure" to appear should result in sanctions against the violating party. In evaluating whether witness testimony should be precluded, the court looks to: "(1) the party's explanation for the failure to comply with the discovery order; (2) the importance of the testimony of the precluded witness; (3) the prejudice suffered by the opposing party as a result of having to prepare to meet the new testimony; and (4) the possibility of a continuance." *Great Am. Ins. Co. of New York* at 543.

Interestingly, Helix did not address the Nevada District Court's decision in Elan Microelectronics, which granted the requested relief under almost identical facts.

Under the factors set forth above, preclusion of Helix's 30(b)(6) testimony is appropriate.

⁶ In interpreting the NRCP, federal cases interpreting the FRCP are "strong persuasive authority" because the NRCP are largely based on their federal counterparts. *See Executive Management, Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53 (2002).

1 First, other than blaming APCO's counsel, Helix provides no explanation for the lack of
2 preparation. APCO's line of questioning also has no bearing on whether the deponents prepared
3 for their depositions. Second, when Helix started incurring extended actual costs and how much
4 was originally budgeted is critical to APCO being able to evaluate the claims being asserted
5 against it. The deponent's testimony was of the utmost importance. Third, APCO has already
6 prepared for Helix's 30(b)(6) deposition twice. APCO graciously agreed to a second deposition
7 when it became clear the first witness was unprepared and not competent to address project
8 costs. With trial set for May 28, 2019, it would be prejudicial to APCO to essentially redo
9 discovery during the time it should be readying the case for trial.

10 The court in *Great Am. Ins. Co. of New York* further included discussion of another
11 instance when a court found that preclusion was appropriate. In *Reilly v. Natwest Markets*
12 *Group, Inc.*, 181 F.3d 253, 268 (2d Cir.1999), "the Second Circuit held that the district court did
13 not abuse its discretion in precluding two witnesses from testifying on subject matters for which
14 a Rule 30(b)(6) designee was unable to provide knowledgeable and specific responses." *Great*
15 *Am. Ins. Co. of New York* AT 543 (emphasis added). Here, Helix's discovery abuses warrant
16 preclusion of the testimony.

17 **B. General conditions are the same as project overhead.**

18 Helix argues that APCO fails to "comprehend the basic nature of Helix's claims" because
19 APCO spent time questioning Mr. Johnson about general conditions as if there could be
20 absolutely no relation between general conditions and extended project overhead. They
21 essentially are the same thing. And just because there is a project delay that does not entitle a
22 subcontractor to a fixed damage. The subcontractor must prove actual costs. That is what
23 APCO was trying to evaluate in these two depositions.

24 Helix has only provided a one-page letter setting forth it claimed costs for its project
25 manager, superintendent, site trailer, connex, forklift and truck and calls it the "**exact** breakdown
26 of Helix's...daily costs."⁷ Actual costs in these categories must be supported by the job cost
27 report and source documents or they are fraudulent.

28 ⁷ See, Opposition, p. 15:20 (emphasis in original).

1 Yet, neither deponent was able to provide this necessary information. APCO therefore
2 requests that this Court enter an order precluding Helix from introducing evidence related to its
3 extended general conditions or to bind Helix to the “I don’t know” answers given in deposition.

4 **C. APCO should not be forced to rely on Helix’s representations regarding its damages**
5 **and partial documentation.**

6 Helix claims that complete job cost report is irrelevant and it had no obligation to
7 produce it because Helix’s claim relates only to damages for when the project went over
8 schedule. However, as set forth above, extended job costs should be based on actual costs
9 supported by the complete job cost report. It should have been produced as part of Helix’s NRC
10 16.1 obligations or in response to APCO’s very broad request for production (that garnered no
11 objection from Helix). As noted in the Motion at p. 25, APCO has twice asked “all accounting
12 documents. . .you claim support the damages” and “all accounting documents” for the Project.
13 In response, Helix produced an incomplete copy of its job cost report.

14 Extended general condition costs are not incurred in a vacuum. For example, how can
15 Helix charge APCO for a project manager that has moved on to other projects? APCO should
16 have been afforded a reasonable opportunity to fully analyze the claims against it and the
17 damages Helix is seeking. Instead, Helix has intentionally restricted the flow of information and
18 provided only limited documentation related to total job costs. And then, Helix objected to
19 questions about job costs because the produced copy was incomplete. But then despite a request
20 and an opportunity to supplement, Helix refused to produce the full cost report. The Court
21 should not sanction this conduct.

22 APCO has demonstrated the relevance of the complete job cost report. Since Helix failed
23 to produce a complete relevant document in the case, it should be precluded from using a partial
24 copy that tells half of the story.

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1 **IV. CONCLUSION**

2 For the reasons set forth above and in the moving papers, APCO respectfully requests
3 that this Court enter an order precluding evidence related to Helix's extended general conditions
4 or evidence of its accounting data.

5 Dated this 8th day of April, 2019.

6 By: /s/ Brandi M. Planet
7 John Randall Jefferies, Esq., NV Bar No. 3512
8 Brandi M. Planet, Esq., NV Bar No. 11710
9 300 S. 4th Street, Suite 1400
10 Las Vegas, NV 89101
11 *Attorneys for APCO Construction, Inc.*
12 *and Safeco Insurance Company of America*

13 **CERTIFICATE OF SERVICE**

14 I hereby certify that I am an employee of Fennemore Craig, P.C., and further certify that
15 the: **APCO CONSTRUCTION, INC. AND SAFECO INSURANCE COMPANY OF**
16 **AMERICA'S REPLY IN SUPPORT OF: MOTION IN LIMINE NO. 3 TO PRECLUDE**
17 **THE INTRODUCTION OF EVIDENCE RELATED TO HELIX'S EXTENDED**
18 **GENERAL CONDITIONS AND MOTION IN LIMINE NO. 4 TO PRECLUDE ANY**
19 **EVIDENCE OF HELIX'S ACCOUNTING DATA OR JOB COST REPORTS** was served
20 by electronically filing via Odyssey File & Serve e-filing system and serving all parties with an
21 email address on record, pursuant to the Administrative Order 14-2 and Rule 9 N.E.F.C.
22

23 DATED: April 8, 2019.

24 /s/ Morganne Westover
25 An Employee of Fennemore Craig, P.C.
26
27
28

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

May 13, 2019

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

May 13, 2019 9:00 AM Apco Construction, Inc. and Safeco Insurance Company of America's Motion in Limine No. 3 to Preclude the Introduction of Evidence Related to Helix's Extended General Conditions and Motion in Limine No. 4 to Preclude Any Evidence of Helix's Accounting Data or Job Cost Reports

HEARD BY: Gonzalez, Elizabeth**COURTROOM:** RJC Courtroom 03E**COURT CLERK:** Dulce Romea**RECORDER:** Jill Hawkins**PARTIES**

PRESENT: Domina, Cary Attorney for Plaintiff
 Jefferies, John R. Attorney for Defendants

JOURNAL ENTRIES

- APPEARANCES CONTINUED: Joe Pelan, Client Representative for Defendant.

Following arguments by counsel, COURT ORDERED, the Motions in Limine are both DENIED. While the issue related to the 30(b)(6) would be of concern the Court will treat that as a credibility issue as to the knowledge of the witness who appeared. The entire job cost report needs to be produced immediately, and if there are any issues related to the job cost report when counsel receives it, the Court will have a discussion about the timing of trial. Mr. Domina stated the job cost report will be generated this week.

5-14-19 9:30 AM CALENDAR CALL

5-28-19 1:30 PM BENCH TRIAL

PRINT DATE: 05/14/2019

Page 1 of 1

Minutes Date: May 13, 2019

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

May 14, 2019

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

May 14, 2019 9:30 AM Calendar Call

HEARD BY: Gonzalez, Elizabeth

COURTROOM: RJC Courtroom 03E

COURT CLERK: Dulce Romea

RECORDER: Jill Hawkins

PARTIES

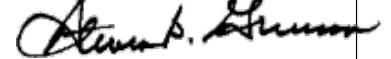
PRESENT: Domina, Cary
 Jefferies, John R.

Attorney for Plaintiff
Attorney for Defendants

JOURNAL ENTRIES

- Parties announced ready and anticipated trial taking 2 to 3 days. COURT ORDERED, bench trial set to COMMENCE on Monday, June 3, 2019.

6-3-19 10:30 AM BENCH TRIAL



1 **PMEM**

2 John Randall Jefferies, Esq. (Bar No. 3512)
3 Brandi M. Planet, Esq. (Bar No. 11710)
4 Chelsie A. Adams, Esq. (Bar No. 13058)
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11 bplanet@fclaw.com
12 cadams@fclaw.com
13 *Attorneys for APCO Construction, Inc.*
14 *and Safeco Insurance Company of America*

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

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

15 Plaintiff,

16 v.

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

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

**SAFECO INSURANCE COMPANY OF
AMERICA'S ANSWER TO PLAINTIFF'S
COMPLAINT**

22 Defendant Safeco Insurance Company of America (hereinafter "Safeco"), by and through
23 its counsel, the law firm of Fennemore Craig, P.C., hereby answers Plaintiff's Complaint as
24 follows:

23 **THE PARTIES**

- 24 1. Safeco is without sufficient information to form a belief as to the truth of the allegations
25 contained in paragraph 1 and, therefore, denies same.
26 2. Safeco admits the allegations contained in paragraphs 2 and 3.

1 3. Safeco is without sufficient information to form a belief as to the truth of the allegations
2 contained in paragraphs 4 and 5 and, therefore, denies same.

3 **JURISDICTIONAL ALLEGATIONS**

4 4. Safeco is without sufficient information to form a belief as to the truth of the allegations
5 contained in paragraphs 6 and 7 and, therefore, denies same.

6 **GENERAL ALLEGATIONS**

7 5. Safeco, in answering paragraph 8, repeats and realleges its answers to all preceding
8 paragraphs as if set forth fully herein.

9 6. Safeco admits the allegations contained in paragraphs 9 and 10.

10 7. Safeco admits only that a bond was executed and delivered, but denies the remaining
11 allegations in paragraph 11.

12 8. Safeco is without sufficient information to form a belief as to the truth of the allegations
13 contained in paragraph 12 and, therefore, denies same.

14 **FIRST CAUSE OF ACTION**

15 **(Breach of Contract—Against APCO)**

16 9. In answering paragraph 13, Safeco repeats and realleges its answers to all preceding
17 paragraphs as if set forth fully herein.

18 10. In answering paragraphs 14 through 20, Safeco states these paragraphs are not directed at
19 Safeco. To the extent further response is required, Safeco incorporates by reference Defendant
20 APCO Construction's ("APCO") answers there and specifically avers that it is without sufficient
21 information to form a belief as to the truth of the allegations contained in paragraphs 14 through
22 20 and, therefore, denies same.

23 **SECOND CAUSE OF ACTION**

24 **(Breach of Implied Covenant of Good Faith & Fair Dealing—Against APCO)**

25 11. In answering paragraph 21, Safeco repeats and realleges its answers to all preceding
26 paragraphs as if set forth fully herein.

27 12. In answering paragraphs 22 through 25, Safeco states these paragraphs are not directed at
28 Safeco. To the extent further response is required, Safeco incorporates by reference

1 APCO's answers there and specifically avers that it is without sufficient information to form a
2 belief as to the truth of the allegations contained in paragraphs 22 through 25 and, therefore,
3 denies same.

4 **THIRD CAUSE OF ACTION**

5 **(Unjust Enrichment or in the Alternative Quantum Meruit—Against APCO)**

6 13. In answering paragraph 26, Safeco repeats and realleges its answers to all preceding
7 paragraphs as if set forth fully herein.

8 14. In answering paragraphs 27 through 34, Safeco states these paragraphs are not directed at
9 Safeco. To the extent further response is required, Safeco incorporates by reference APCO's
10 answers there and specifically avers that it is without sufficient information to form a belief as to
11 the truth of the allegations contained in paragraphs 27 through 34 and, therefore, denies same.

12 **FOURTH CAUSE OF ACTION**

13 **(Violation of NRS 338.550—Against APCO)**

14 15. In answering paragraph 3 *[sic]*, Safeco repeats and realleges its answers to all preceding
15 paragraphs as if set forth fully herein.

16 16. In answering paragraphs 4 through 8 *[sic]*, Safeco states these paragraphs are not directed
17 at Safeco. To the extent further response is required, Safeco incorporates by reference APCO's
18 answers there and specifically avers that it is without sufficient information to form a belief as to
19 the truth of the allegations contained in paragraphs 4 through 8 *[sic]* and, therefore, denies same.

20 **FIFTH CAUSE OF ACTION**

21 **(Claim Against Payment Bond---Against Safeco)**

22 17. In answering paragraph 35, Safeco repeats and realleges its answers to all preceding
23 paragraphs as if set forth fully herein.

24 18. Safeco admits only that a bond was executed and delivered, but denies the remaining
25 allegations in paragraph 36.

26 19. Safeco is without sufficient information to form a belief as to the truth of the allegations
27 contained in paragraphs 37 and 38 and, therefore, denies same.

28 ///

1 20. Safeco, in answering paragraph 39, states that the Bond language speaks for itself. To the
2 extent further response is required, Safeco states that it denies any allegations to the extent they
3 are inconsistent with the express language of the Bond.

4 21. Safeco is without sufficient information to form a belief as to the truth of the allegations
5 contained in paragraphs 40 through 45 and, therefore, denies same.

6 **GENERAL DENIAL**

7 Safeco denies each and every allegations not specifically admitted herein.

8 **AFFIRMATIVE DEFENSES**

9 1. Safeco's liability for payment under the bond, if any, is limited to the penal sum of the
10 bond in accordance with Nevada law.

11 2. Safeco's liability, if any, on a supporting bond is limited to APCO's failure, if any, to
12 perform or pay under a contract for which the bond was issued. To that end, Safeco incorporates
13 by reference APCO's answer and affirmative defenses.

14 3. Plaintiff has failed to satisfy all conditions precedent to recovery under the subject bond.

15 4. Plaintiff has failed to mitigate its damages, if any.

16 5. Plaintiff's claims are precluded by the applicable statute of limitations.

17 6. Plaintiff's claims are precluded by the doctrines of laches and unclean hands.

18 7. APCO performed, satisfied and discharged all of its duties and obligations it may have
19 owed Plaintiff, which arose out of any and all agreements, contracts or representations, unless and
20 until prevented from further doing so, and thereby extinguished and fully discharged all such
21 duties and obligations, if any.

22 8. Plaintiff failed to comply with its notice obligations as set forth in Nevada law and/or in
23 the applicable contracts or agreements.

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1 WHEREFORE, Safeco prays for judgment against Plaintiff as follows:
2 1. That Plaintiff take nothing by way of its Complaint and that the same be dismissed
3 with prejudice;
4 2. For an award of reasonable attorneys' fees and costs of suit; and
5 3. For other such relief as the Court deems just and proper.
6 DATED this May 16, 2019.

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

9 By: /s/ Brandi M. Planet
10 John Randall Jefferies, Esq. (Bar No. 3512)
11 Brandi M. Planet, Esq. (Bar No. 11710)
12 Chelsie A. Adams, Esq. (Bar No. 13058)
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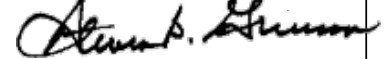
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Fennemore Craig, P.C., and further certify that the: **SAFECO INSURANCE COMPANY OF AMERICA’S ANSWER TO PLAINTIFF’S COMPLAINT** was served by electronically filing via Odyssey File & Serve e-filing system and serving all parties with an email address on record, pursuant to the Administrative Order 14-2 and Rule 9 N.E.F.C.

DATED: May 16, 2019.

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



1 John Randall Jefferies, Esq. (Bar No. 3512)
2 Brandi M. Planet, Esq. (Bar No. 11710)
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10 bplanet@fclaw.com
11 cadams@fclaw.com
12 Attorneys for APCO Construction, Inc.
13 and Safeco Insurance Company of America

9
10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

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

14 Plaintiff,

15 v.

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

Defendants.

Case No.: A-16-730091-B
Dept. No.: XI

HEARING REQUESTED

APCO CONSTRUCTION, INC. AND
SAFECO INSURANCE COMPANY OF
AMERICA'S MOTION TO EXCLUDE THE
TESTIMONY OF KURT WILLIAMS ON
ORDER SHORTENING TIME

Hearing Date: 06/03/19
Time: 10:15 am

21 APCO Construction, Inc. ("APCO") and Safeco Insurance Company of America
22 ("Safeco")(collectively referred to as "Defendants"), by and through their attorneys, Fennemore
23 Craig, P.C., hereby move this Court for an Order excluding Kurt Williams from testifying at the
24 trial in this matter, to be heard on an Order Shortening Time. Helix Electric of Nevada, LLC
25 ("Helix") recently represented to APCO and the Court that Mr. Williams was the person most
26 knowledgeable regarding the NRCP 30(b)(6) topics previously noticed by APCO. Instead of

1 producing Mr. Williams, Helix produced two unprepared witnesses. Defendants are now
2 prejudiced and Helix should not be allowed to call its true but previously “unavailable” person
3 most knowledgeable at trial. The Court should not sanction this conduct.

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

6 DATED this 21st day of May, 2019.

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

9 By: /s/ John Randall Jefferies
10 John Randall Jefferies, Esq. (Bar No. 3512)
11 Brandi M. Planet, Esq. (Bar No. 11710)
12 Chelsie A. Adams, Esq. (Bar No. 13058)
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ORDER SHORTENING TIME

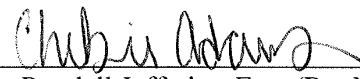
IT IS HEREBY ORDERED that the hearing on APCO CONSTRUCTION, INC. AND
SAFECO INSURANCE COMPANY OF AMERICA'S MOTION TO EXCLUDE THE
TESTIMONY OF KURT WILLIAMS ON ORDER SHORTENING TIME will be heard on the
3rd day of JUNE, 2019, at the hour of 10:15am in Department XI of
the above-entitled Court, or as soon thereafter as counsel may be heard.

DATED this 22nd day of May, 2019.


DISTRICT COURT JUDGE

Submitted by:

FENNEMORE CRAIG, P.C.

By: 
John Randall Jefferies, Esq. (Bar No. 3512)
Brandi M. Planet, Esq. (Bar No. 11710)
Chelsie A. Adams, Esq. (Bar No. 13058)
FENNEMORE CRAIG, P.C.
300 S. 4th Street, Suite 1400
Las Vegas, NV 89101

**DECLARATION OF JOHN RANDALL JEFFERIES IN SUPPORT OF APCO
CONSTRUCTION, INC. AND SAFECO INSURANCE COMPANY OF AMERICA'S
MOTION TO EXCLUDE THE TESTIMONY OF KURT WILLIAMS ON ORDER
SHORTENING TIME**

I, John Randall Jefferies, hereby declare under penalty of perjury as follows:

1. I am licensed to practice law in the State of Nevada. I have personal knowledge of the facts stated herein. I am competent to testify as to the facts stated herein in a court of law.
2. I am the attorney representing APCO Construction Inc. ("APCO") and Safeco Insurance Company of America ("Safeco"), and I am submitting this Declaration in support of their Motion to Exclude the Testimony of Kurt Williams ("Motion").
3. On May 20, 2019, I conferred with Cary Domina, Esq., opposing counsel, on the subject of this Motion; however, we were unable to reach resolution.
4. A bench trial is set to commence on Monday, June 3, 2019 at 10:30 a.m.
5. Cause for an order shortening time exists so that APCO may resolve this evidentiary issue prior to the bench trial.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing declaration is true and correct to the best of my knowledge, information and belief and that this declaration was executed on this 21st day of May, 2019, in the County of Clark, State of Nevada.

/s/ John Randall Jefferies
John Randall Jefferies, Esq.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This matter arises from the construction of the public works project of Craig Ranch
4 Regional Park Phase II ("Project"). APCO was the general contractor and Helix Electric of
5 Nevada, LLC ("Helix") was the electrical subcontractor.

6 On July 3, 2018, APCO noticed the deposition of Helix's NRCP 30(b)(6) person(s) most
7 knowledgeable.¹ The notice set forth seven topics for the corporate designee(s) to discuss,
8 including Helix's claimed damages as they related to "Helix's general extended conditions."² On
9 two separate occasions, Helix presented two unprepared witnesses for deposition, not Kurt
10 Williams. Now, Helix apparently has made arrangements to have Kurt Williams testify on the
11 noticed topics at the time of trial, claiming Mr. Williams is more knowledgeable. Helix failed to
12 produce Mr. Williams in compliance with NRCP 30(b)(6). In order to avoid prejudice and delay,
13 this Court should preclude the testimony of Mr. Williams.

14 **II. LEGAL ARGUMENT**

15 APCO incorporates its prior Motion in Limine No. 3 by this reference. That motion
16 provides the background confirming Helix's failure to comply with its obligations under NRCP
17 30(b)(6). Helix presented not one, but two equally unprepared witnesses for deposition. Both
18 witnesses admitted under oath that they did little to nothing to prepare.

19 Q. Okay. [Mr. Pritzel] Did you take any steps to investigate any topics on the
deposition for today?

20 A. No.³

21 Q. Okay. [Mr. Johnson] What steps did you take to investigate the topics in the
22 notice for today's depositions?

23 A. Basically just read some of the paperwork transcripts that were provided
24 from Ray [Pritzel's] testimony, or not testimony, but deposition, and
basically the filings on the case.

25 * * *

26 Q. Okay. Did you take any steps to review any corporate records?

27

¹ Exhibit 1, Notice of Deposition of Helix's PMK.

28 ² *Id.*

³ Exhibit 2 to the Motion, Deposition of Eric Rainer Pritzel at 12:6-9.

1 A. **Not in preparation for this**, but recently went through some of the records
2 at the request for our attorney through you for some documents related to
3 some equipment lists. So I went back through everything on that, but just
 specifically for that.⁴

4 It is Helix's obligation to prepare and produce competent and prepared witnesses. To
5 satisfy Rule 30(b)(6), the corporate deponent has an affirmative duty to make available "such
6 number of persons as will" be able "to give complete, knowledgeable and binding answers" on its
7 behalf.⁵ "The fact that an organization no longer has a person with knowledge on the designated
8 topics does not relieve the organization of the duty to prepare a Rule 30(b)(6) designee" and the
9 corporation must still prepare the designee "to the extent matters are reasonably available, whether
10 from documents, past employees, or other sources."⁶ At this late stage, Helix should not be
11 permitted to produce Mr. Williams to rehabilitate its previously designated NRCP 30(b)(6)
12 witnesses.

13 When a party fails to comply with NRCP 30(b)(6), NRCP 37 allows courts to impose
14 sanctions, including the preclusion of evidence. In evaluating whether witness testimony should be
15 precluded, the court looks to: "(1) the party's explanation for the failure to comply with the
16 discovery order; (2) the importance of the testimony of the precluded witness; (3) the prejudice
17 suffered by the opposing party as a result of having to prepare to meet the new testimony; and (4)
18 the possibility of a continuance."⁷

19 In *Reilly v. Natwest Markets Group Inc.*, the court upheld the exclusion of two witnesses.
20 While both witnesses were on the corporation's witness list, neither one had been produced for
21 deposition in response to a Rule 30(b)(6) notice.⁸ Instead, the corporation produced witnesses that
22 were not properly prepared to address all noticed topics at deposition.⁹ In assessing the propriety
23 of the district court's decision, the court first considered the party's failure to explain why the new
24 witnesses were not made available for deposition pursuant to Rule 30(b)(6). In addition, the court

25
26 ⁴ Exhibit 3 to the Motion, Deposition of Robert Johnson at 7:3-9, 7:19-25 (emphasis added).

27 ⁵ *Securities & Exchange Comm'n v. Morelli*, 143 F.R.D. 42, 45 (S.D.N.Y.1992) (quotations omitted).

28 ⁶ *Great Am. Ins. Co. of New York v. Vegas Const. Co.*, 251 F.R.D. 534, 539 (D. Nev. 2008).

⁷ *Id.* at 543. See also *Reilly v. Natwest Markets Group Inc.*, 181 F.3d 253, 269 (2d Cir. 1999).

⁸ *Reilly*, 181 F.3d at 269.

⁹ *Id.* at 268.

1 deemed the anticipated testimony cumulative in light of the testimony of the party's expert witness
2 and previously designated Rule 30(b)(6) witnesses. The court further concluded that the opposing
3 party would be prejudiced based on their inability to depose the witness. Finally, the court
4 determined that any trial delay to allow depositions was unwarranted.¹⁰

5 Applying the relevant factors, this Court should preclude Mr. Williams from testifying at
6 trial. First, Helix has failed to explain why Mr. Williams was unavailable at the time of deposition,
7 but is now available at the time of trial. Even if there were a plausible explanation for not
8 producing Mr. Williams for deposition, Helix still had an affirmative obligation to prepare the
9 witnesses it did produce pursuant to NRCP 30(b)(6). Despite two corporate attempts, Helix could
10 not answer the questions. Second, while the anticipated testimony of Mr. Williams may be of
11 critical importance to Helix's claims against APCO, that fact merely underscores and confirms
12 Defendant's prejudice by being denied such critical evidence during discovery. Helix should be
13 bound by its answers provided at the NRCP 30(b)(6) depositions. Third, as in *Reilly*, APCO would
14 be prejudiced based on its inability to depose Mr. Williams prior to trial. APCO graciously agreed
15 to a second deposition when it became clear the first witness was unprepared and not competent to
16 address project costs. With trial set for June 3, 2019, it would be prejudicial to APCO to take time
17 away from preparing for trial to depose a witness that Helix failed to timely produce. Those
18 ramifications should not fall on Defendants. Fourth, and finally, it would be unwarranted to delay
19 trial in order to allow APCO to depose Mr. Williams. Helix is not entitled to a third opportunity to
20 produce a witness to support its general conditions claims and damages.

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¹⁰ *Id.*

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III. CONCLUSION

For the reasons set forth above, APCO respectfully requests that this Court enter an order precluding Mr. Williams from testifying at trial.

DATED this May 21, 2019.

FENNEMORE CRAIG, P.C.

By: /s/ John Randall Jefferies
John Randall Jefferies, Esq. (Bar No. 3512)
Brandi M. Planet, Esq. (Bar No. 11710)
Chelsie A. Adams, Esq. (Bar No. 13058)
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Fennemore Craig, P.C., and further certify that the: **APCO CONSTRUCTION, INC. AND SAFECO INSURANCE COMPANY OF AMERICA'S MOTION TO EXCLUDE THE TESTIMONY OF KURT WILLIAMS ON ORDER SHORTENING TIME** was served by electronically filing via Odyssey File & Serve e-filing system and serving all parties with an email address on record, pursuant to the Administrative Order 14-2 and Rule 9 N.E.F.C.

DATED: May 22, 2019.

/s/ Cheryl Landis
An Employee of Fennemore Craig, P.C.

Exhibit “1”

Exhibit “1”

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

NOTICE OF TAKING NRCP RULE 30(B)(6) DEPOSITION OF PERSON MOST
KNOWLEDGEABLE FOR HELIX ELECTRIC OF NEVADA LLC

21 PLEASE TAKE NOTICE that pursuant to Rule 30(b)(6) of the Nevada Rules of Civil
22 Procedure, Defendant, APCO Construction, by and through its attorneys, Marquis Aurbach
23 Coffing, will take the deposition of Helix Electric of Nevada LLC upon oral examination on
24 **July 17th, 2018 at 9:30a.m.** before a Notary Public, or before some other officer authorized by
25 law to administer oaths.

26 The deposition will take place at **Marquis Aurbach Coffing, 10001 Park Run Drive,**
27 **Las Vegas, NV 89145.**

MARQUIS AURBACH COFFING

10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1 Pursuant to NRCP 30(b)(6), Plaintiffs are to required to designate one or more officers,
2 directors, managing agents or other consenting persons most knowledgeable to testify on its
3 behalf with respect to the topics set forth in the attached **Exhibit A**.

4 The deposition will be recorded by stenographic means, and oral examination will
5 continue from day to day until completed. You are invited to attend and cross-examine.

6 Dated this 3rd day of July, 2018.

7
8 MARQUIS AURBACH COFFING

9
10 By 

Avece M. Higbee, Esq.
Nevada Bar No. 3739
Cody S. Mounteer, Esq.
Nevada Bar No. 11220
Kathleen A. Wilde, Esq.
Nevada Bar No. 12522
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorney(s) for APCO CONSTRUCTION

EXHIBIT A**RULE 30. DEPOSITIONS BY ORAL EXAMINATION****(B) NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; SPECIAL NOTICE: METHOD OF PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION; DEPOSITION BY TELEPHONE.**

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

[As amended; effective January 1, 2005.]

TOPICS

1. Your claims and facts as alleged against APCO;
2. Documents that you have disclosed in support of your claims against APCO;
3. Your assertion that APCO is liable for any portions of your general and/or bond claims;
4. The payment process, payment details, scope of payments, parties involved, and standard practices of payment, including, but not limited to, all payment applications, approvals, amounts, checks, and releases;
5. Each fact related to your contract agreement with APCO in regard to the Craig Ranch ("Project") at issue in this matter, including, but not limited to original contact(s), change orders, and ratification agreement(s);
6. Each fact related to your scope of work at the Project; and
7. Your claimed damages against APCO, more specific, but not limited to, your assertions of damages as they relate to Helix's general extended conditions.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing NOTICE OF TAKING NRCP RULE 30(B)(6) DEPOSITION OF PERSON MOST KNOWLEDGEABLE FOR HELIX ELECTRIC OF NEVADA LLC was submitted electronically for service with the Eighth Judicial District Court on the 3rd day of July 2018. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹

Peel Brimley LLP

Contact

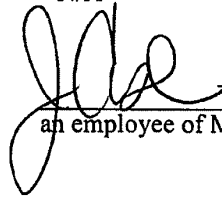
Amanda Armstrong
Cary B. Domina
Rosey Jeffrey
Terri Hansen

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

¹ 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).

Exhibit “2”

Exhibit “2”

In the Matter Of:
A-16-730091-C
HELIX ELECTRIC OF NEVADA
VS
APCO CONSTRUCTION, et al.

Transcript Of The 30(b)(6) For:

HELIX ELECTRIC,
ERIC RAINER PRITZEL

October 04, 2018



702-805-4800
scheduling@envision.legal

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DISTRICT COURT
CLARK COUNTY, NEVADA

HELIX ELECTRIC OF NEVADA,)	
LLC, a Nevada limited)	
liability company,)	
)	
Plaintiff,)	CASE NO.
)	A-16-730091-C
vs.)	DEPT. NO. XVII
)	
APCO CONSTRUCTION, a)	
Nevada corporation; SAFECO)	
INSURANCE COMPANY OF)	
AMERICA; DOES I through X;)	
and BOE BONDING COMPANIES,)	
I through X,)	
)	
Defendants.)	

DEPOSITION OF ERIC RAINER PRITZEL

Helix Electric 30(b)(6)

Taken at the Law Offices of
SPENCER FANE LLP
300 South Fourth Street, Suite 950
Las Vegas, Nevada 89101
On October 4, 2018
At 10:03 a.m.

Job No: 1782
Reported by: JENNIFER M. DALY, CRR, RPR, CCR, CSR
License No.: 766

October 04, 2018

Helix Electric, Eric Rainer Pritzel

30(b)(6)
Pages 2..5

<p>Page 2</p> <p>1 APPEARANCES:</p> <p>2 PEEL BRIMLEY LLP</p> <p>3 BY: CARY B. DOMINA, ESQ.</p> <p>4 cdomina@peelbrimley.com</p> <p>5 3333 E. Serene Avenue</p> <p>6 Suite 200</p> <p>7 Henderson, Nevada 89074</p> <p>8 702.990.7272</p> <p>9 On behalf of the Plaintiff;</p> <p>10</p> <p>11 SPENCER FANE LLP</p> <p>12 BY: JOHN RANDALL JEFFERIES, ESQ.</p> <p>13 rjefferies@spencerfane.com</p> <p>14 300 South Fourth Street</p> <p>15 Suite 950</p> <p>16 Las Vegas, Nevada 89101</p> <p>17 702.408.3411</p> <p>18 On behalf of the Defendant,</p> <p>19 Apco Construction, Inc.</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24 * * * * *</p> <p>25</p>	<p>Page 4</p> <p>1 LAS VEGAS, NEVADA, THURSDAY, OCTOBER 4, 2018</p> <p>2 10:03 A.M.</p> <p>3 -000-</p> <p>4 WHEREUPON --</p> <p>5 (IN AN OFF-THE-RECORD DISCUSSION HELD PRIOR TO THE</p> <p>6 COMMENCEMENT OF THE PROCEEDINGS, COUNSEL AGREED TO</p> <p>7 WAIVE THE COURT REPORTER'S REQUIREMENTS UNDER NEVADA</p> <p>8 RULES OF CIVIL PROCEDURE, RULE 30(B)(4), OR FEDERAL</p> <p>9 RULES OF CIVIL PROCEDURE, RULE 30(B)(5), AS</p> <p>10 APPLICABLE.)</p> <p>11 (WITNESS SWORN.)</p> <p>12 Whereupon,</p> <p>13 ERIC RAINER PRITZEL,</p> <p>14 having been first duly sworn to testify to the</p> <p>15 truth, the whole truth, and nothing but the truth,</p> <p>16 was examined and testified as follows:</p> <p>17 DIRECT EXAMINATION</p> <p>18 BY MR. JEFFERIES:</p> <p>19 Q. Sir, will you state your full name for</p> <p>20 the record, please.</p> <p>21 A. Eric Rainer Pritzel. Everyone calls me</p> <p>22 Ray.</p> <p>23 Q. Do you mind if I call you Ray?</p> <p>24 A. Go right ahead.</p> <p>25 Q. We had some discussion before we went on</p>
<p>Page 3</p> <p>1 I N D E X</p> <p>2 WITNESS: ERIC RAINER PRITZEL</p> <p>3 EXAMINATION PAGE</p> <p>4 BY MR. JEFFERIES 4</p> <p>5</p> <p>6</p> <p>7 E X H I B I T S</p> <p>8 (NO EXHIBITS MARKED)</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>Page 5</p> <p>1 the record. I have marked as Exhibit 1, and I do</p> <p>2 want to show you, and Cary has a copy, this is a</p> <p>3 Notice of Deposition where we identify topics to be</p> <p>4 addressed, and it's my understanding that you've</p> <p>5 been designated by Helix to talk about certain</p> <p>6 topics, and my first question to you is what topics</p> <p>7 do you believe you're being designated to testify</p> <p>8 about?</p> <p>9 A. The -- I was the field superintendent.</p> <p>10 So anything that needed to be coordinated out in the</p> <p>11 field, construction-wise, you know, conduit, wire,</p> <p>12 pulling, trenching, stuff like that, then that's</p> <p>13 what I can answer for you. Any type of equipment</p> <p>14 stuff like that.</p> <p>15 Q. Okay. How about project billing?</p> <p>16 A. That's -- I'm not the guy for that.</p> <p>17 Q. Okay. How about project job cost</p> <p>18 accounting?</p> <p>19 A. That would not be me.</p> <p>20 Q. Okay. What about notice of claims?</p> <p>21 A. That's not my scope of work.</p> <p>22 Q. Okay. All right. Well, in fairness to</p> <p>23 you and the record, to the extent I touch on a topic</p> <p>24 that you think goes beyond your -- what you've been</p> <p>25 designated for and/or your personal knowledge,</p>

<p style="text-align: right;">Page 6</p> <p>1 please tell me.</p> <p>2 A. Sure.</p> <p>3 Q. Have you ever had your deposition taken</p> <p>4 before?</p> <p>5 A. No.</p> <p>6 Q. Okay. Let me go over a few of the ground</p> <p>7 rules. As you can see, the court reporter is taking</p> <p>8 down everything that is said in the room, so it's</p> <p>9 important that only one of us speak at a time. In</p> <p>10 conversation, we tend to know where the other person</p> <p>11 is going, and if you live in my house, everybody</p> <p>12 talks over each other, so we need to try and avoid</p> <p>13 that.</p> <p>14 So if you let me finish my question</p> <p>15 before you start your answer, I'm going to let you</p> <p>16 finish your answer before I move on to my next</p> <p>17 question, okay?</p> <p>18 A. Understood.</p> <p>19 Q. So if I say, "Were you through with your</p> <p>20 answer," I'm not trying to be rude. I just want to</p> <p>21 make sure you were complete before I move on, okay?</p> <p>22 A. Yes, sir.</p> <p>23 Q. You're doing a great job so far. It's</p> <p>24 important we give audible responses to my questions.</p> <p>25 It's hard for her to take down a shake or</p>	<p style="text-align: right;">Page 8</p> <p>1 A. None at all.</p> <p>2 Q. Do you have any questions about the</p> <p>3 process?</p> <p>4 A. No, sir.</p> <p>5 Q. Okay. What did you do to prepare for</p> <p>6 your deposition today?</p> <p>7 A. Nothing.</p> <p>8 Q. Okay. Did you review any records?</p> <p>9 A. I reviewed some of the records. Just</p> <p>10 minor, but they're -- pretty much what I've reviewed</p> <p>11 is accurate.</p> <p>12 Q. That's a good thing, but number two, what</p> <p>13 did you review?</p> <p>14 A. Just some of the cost accrued, the amount</p> <p>15 of time we had, the trailer, the forklifts, the wire</p> <p>16 pullers, you know, pulling trailer right there, any</p> <p>17 of those sheets where we had those accrued costs.</p> <p>18 Q. You reviewed, like, a Helix job cost</p> <p>19 report?</p> <p>20 A. It was just a minor -- it -- just a minor</p> <p>21 sheet. Hey, this is the material and stuff that you</p> <p>22 had from, I believe, that January date on. Can you</p> <p>23 verify this, and yes, to the best of my knowledge,</p> <p>24 those are 100 percent accurate.</p> <p>25 Q. I'm not entitled to, and nor do I want</p>
<p style="text-align: right;">Page 7</p> <p>1 a nod of the head or a "uh-huh" or "uh-uh." When</p> <p>2 you read it on paper, it just makes for an unclear</p> <p>3 record.</p> <p>4 So, again, if I say, "Was that a yes or a</p> <p>5 no," I'm not trying to be rude. I just want to make</p> <p>6 sure we both have a clear record, okay?</p> <p>7 A. I understand.</p> <p>8 Q. Okay. If you don't understand any of my</p> <p>9 questions, let me know, and I'll try to clarify it</p> <p>10 for you. If you answer the question, I'm going to</p> <p>11 assume that you understood it as asked, okay?</p> <p>12 A. Understood.</p> <p>13 Q. You'll quickly figure out that we're</p> <p>14 pretty informal here, so if you want to take a break</p> <p>15 at any time, let me know. My only request is that</p> <p>16 you not ask for a break if I've got a question</p> <p>17 pending; let's get your answer in the record, then</p> <p>18 we can take a break, okay?</p> <p>19 A. Not a problem. Yes.</p> <p>20 Q. Are you on any type of medication that</p> <p>21 would affect your testimony today?</p> <p>22 A. None.</p> <p>23 Q. Okay. Personally or professionally, are</p> <p>24 there things in your life that make this just a</p> <p>25 terrible day to have your deposition taken?</p>	<p style="text-align: right;">Page 9</p> <p>1 to, ask about any communications you may have had</p> <p>2 with Cary.</p> <p>3 So excluding discussions you had with</p> <p>4 him, did you discuss the items you just referenced</p> <p>5 with anybody at Helix outside of Cary's presence?</p> <p>6 A. No.</p> <p>7 Q. Other than what sounds like a summary of</p> <p>8 the claimed costs, if I'm understanding what -- was</p> <p>9 it a one-page summary?</p> <p>10 A. Yes.</p> <p>11 MR. DOMINA: I'll just tell you, it was</p> <p>12 -- one of the invoices that Helix submitted on the</p> <p>13 back, there was a spreadsheet that broke down --</p> <p>14 itemized the general conditions.</p> <p>15 MR. JEFFERIES: Okay.</p> <p>16 MR. DOMINA: It's part of the record,</p> <p>17 what you guys have seen.</p> <p>18 BY MR. JEFFERIES:</p> <p>19 Q. Is that the only document you reviewed?</p> <p>20 A. Yes, I saw some of this stuff, but that's</p> <p>21 the only one that would really pertain to me.</p> <p>22 Q. This stuff you're referring to,</p> <p>23 Exhibit 1?</p> <p>24 A. The daily reports.</p> <p>25 Q. Okay. That's what those are.</p>

October 04, 2018

Helix Electric, Eric Rainer Pritzel

30(b)(6)
Pages 10..13

<p style="text-align: right;">Page 10</p> <p>1 Have you reviewed Exhibit 1 before, the 2 topics that I'm going to be asking about? 3 A. No. 4 Q. Just so our record is clear -- 5 MR. DOMINA: I don't know if -- this is 6 the document. This is what I showed you this 7 morning. 8 THE WITNESS: Okay. 9 MR. DOMINA: I don't think he's familiar 10 with what it looks like, but it's the Notice of 11 Deposition, the topics that we went through. 12 THE WITNESS: Okay. 13 MR. DOMINA: I don't mind putting that on 14 the record, just to clarify, so it's accurate, his 15 testimony is accurate. 16 MR. JEFFERIES: Okay. 17 MR. DOMINA: What you're looking at is an 18 amended version of it, right? What is he -- 19 MR. JEFFERIES: I think the exhibit 20 stayed the same -- I mean, the topics stayed the 21 same. 22 Let me make sure my record is clear. 23 MR. DOMINA: This isn't -- this isn't -- 24 this is, like, a Target case. 25 This isn't even the right case that you</p>	<p style="text-align: right;">Page 12</p> <p>1 Q. Is that a yes? 2 A. Yes. Sorry. 3 Q. Anything else that you reviewed to 4 prepare for your deposition today? 5 A. No. 6 Q. Okay. Did you take any steps to 7 investigate any topics on the deposition notice for 8 today? 9 A. No. 10 Q. Did you -- strike that. 11 Excluding communications with your 12 counsel, did you take any steps to talk to other 13 Helix people to investigate any of the topics in the 14 notice for today? 15 A. No. 16 Q. Sir, can you describe for me your 17 educational background? 18 A. If you want me to go back to just high 19 school, high school graduate, and then been working 20 for Helix Electric for 23 years. 21 Q. Okay. Any post-high school education? 22 A. No. Helix offers classes for continuing 23 education, like OSHA 30 cards, qualified electrical 24 workers, motor controls, underground forklifts 25 scissors lifts. So those are the classes we do to</p>
<p style="text-align: right;">Page 11</p> <p>1 got here. 2 MR. JEFFERIES: Oh. 3 MR. DOMINA: That's why when I saw him 4 flipping through, he's shaking his head like, "What 5 is all that?" There were, like, five categories of 6 topics. 7 MR. JEFFERIES: Oh, I grabbed the wrong 8 one. 9 MR. DOMINA: That's why he was confused, 10 as was I. 11 BY MR. JEFFERIES: 12 Q. You haven't studied these? 13 A. No, I can build a Target; I can build 14 anything you want in this town. 15 (Short break was taken.) 16 MR. JEFFERIES: With your permission, 17 when I get the other one, I'm going to substitute 18 it. 19 MR. DOMINA: That's fine. 20 BY MR. JEFFERIES: 21 Q. We can keep going. 22 I want to get a sense for -- you reviewed 23 the summary of costs and a deposition notice, 24 correct? 25 A. Mm-hmm.</p>	<p style="text-align: right;">Page 13</p> <p>1 renew our licenses or further our education through 2 Helix. 3 Q. 23 years with Helix; is that right? 4 A. Yes, that's correct. 5 Q. What's your current position? 6 A. I am a foreman, lead man, on -- working 7 at Conquistador, Tompkins Elementary School. 8 Q. Are your titles within the Helix 9 organization job specific, or do you have just kind 10 of a general -- 11 A. They would be job specific. 12 Q. Okay. Have you ever served as a project 13 manager on a project for Helix? 14 A. No. 15 Q. Okay. Have you ever served as a project 16 engineer for Helix? 17 A. No. 18 Q. Have you ever served as a general 19 superintendent for a project for Helix? 20 A. No. 21 Q. How -- okay. I'm going to shorthandedly 22 use the term, "the project," and when I do, sir, I'm 23 referring to the Craig Ranch Road Park, Phase II, 24 that Apco constructed for the city, okay? 25 A. Understood.</p>

Exhibit “3”

Exhibit “3”

In the Matter Of:

A-16-730091-C

HELIX ELECTRIC OF NEVADA

VS

APCO CONSTRUCTION

Deposition Of:

ROBERT JOHNSON

November 28, 2018



702-805-4800

scheduling@envision.legal

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DISTRICT COURT
CLARK COUNTY, NEVADA

HELIX ELECTRIC OF NEVADA,)	
LLC, a Nevada limited)	
liability company,)	
)	
Plaintiff,)	
)	Case No. A-16-730091-C
)	Dept. No. XVII
vs.)	
)	
APCO CONSTRUCTION, a Nevada)	
corporation; SAFECO)	
INSURANCE COMPANY OF)	
AMERICA; DOES I through X;)	
and BOE BONDING COMPANIES, I)	
through X,)	
)	
Defendants.)	

DEPOSITION OF ROBERT JOHNSON
LAS VEGAS, NEVADA
TUESDAY, NOVEMBER 28, 2018
at 11:55 a.m.

Reported By: LISA MAKOWSKI, CCR 345, CA CSR 13400
JOB NO: 2217

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DEPOSITION OF ROBERT JOHNSON, taken at 300

South Fourth Street, Suite 950, Las Vegas, Nevada, on

Tuesday, November 28, 2018, at 11:55 a.m., before

Lisa Makowski, Certified Court Reporter, in and for

the State of Nevada.

APPEARANCES:

For Apco Construction, Inc.:

SPENCER FANE LLP

BY: JOHN RANDALL JEFFERIES, ESQ.

BY: MARY BACON, ESQ.

300 South Fourth Street

Suite 950

Las Vegas, Nevada 89101

(702)408-3400

Rjefferies@spencerfane.com

For Helix Electric:

PEEL BRIMLEY LLP

BY: CARY DOMINA, ESQ.

3333 East Serene Avenue

Suite 200

Henderson, Nevada 89074

(702)990-7272

Cdomina@peelbrimley.com

Also Present: Joe Pelan

* * * * *

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LAS VEGAS, NEVADA, TUESDAY, NOVEMBER 28, 2018

11:55 a.m.

-o-o-

(The court reporter requirements under

Rule 30(b)(4) of the Nevada Rules of

Civil Procedure were waived.)

ROBERT JOHNSON,

having been first duly sworn, did testify as follows:

EXAMINATION

BY MR. JEFFERIES:

Q. Sir, will you state your full name for

the record, please.

A. Robert Johnson.

Q. How many times have you had your

deposition taken?

A. More than I can remember.

Q. Okay. You understand you are appearing

here today as the corporate designee to address the

items in, I think what is our fourth or third,

let's go with fourth amended notice of deposition?

A. Yes.

Q. Okay.

Page 3

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INDEX

WITNESS

ROBERT JOHNSON

Examination by Mr. Jefferies

Examination by Mr. Domina

Further Examination by Mr. Jefferies

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MR. DOMINA: And just to clarify, he is

here to cover those that weren't covered in the

prior 30(b)(6) depositions. There were a few in

there.

BY MR. JEFFERIES:

Q. What is your position with Helix

Electric?

A. Senior vice president.

Q. And how long have you held that position?

A. Probably the last ten years.

Q. Okay. I'm going to shorthandedly use the

term "the project," and when I do, sir, please

understand that I am referring to the Craig Ranch

Regional Park Phase 3 project that Apco did for the

city, okay?

A. Okay.

Q. What was your personal involvement with

the project?

A. As senior vice president over the

project. So superintendent, project manager work

in my group, so I have oversight from a higher

level of the project.

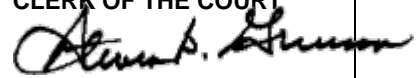
Q. Okay. Did you have any responsibility

for bidding the project?

A. No.

<p style="text-align: right;">Page 6</p> <p>1 Q. Do you know how many months Helix's bid 2 assumed that Helix would be working on the project? 3 A. No, but it would have been the contract 4 duration that was provided at bid time, whatever 5 that was. 6 Q. Okay. So were you involved in the pay 7 application process? 8 A. Yes, from the signing and the releases. 9 Q. Okay. And would the pay applications 10 have reflected Helix's anticipated time on the 11 project through the general condition related line 12 items? 13 A. I didn't quite follow that. Say that 14 again. 15 Q. Okay. Your pay applications include 16 general condition type billings; correct? 17 A. Typically, but not always. It depends on 18 if the contract allowed it. I don't recall in this 19 one, but go ahead. 20 Q. Would it have been Helix's practice to 21 spread the general conditions over the anticipated 22 time on the job? 23 A. Not necessarily. A lot of jobs you're 24 allowed to get general conditions earlier on 25 because it's mobilization costs that are in there.</p>	<p style="text-align: right;">Page 8</p> <p>1 Q. Okay. So in preparation for today's 2 deposition you didn't review any corporate records? 3 A. No. 4 Q. I want to go back to one of my prior 5 questions and make sure my record is clear. 6 Sitting here today, do you know what Helix's bid 7 assumed in terms of the time that Helix would be 8 required to be on the project? 9 A. I don't know the exact time as in 10 duration. I do know that the original contract 11 completion was early January of 2013. When it 12 started I don't know, and the duration of it I 13 don't recall. 14 Q. Do you know how many times Helix bid this 15 job? 16 A. No, I don't recall. It's not relevant to 17 me as operations. 18 Q. What was your day-to-day involvement with 19 the project? 20 A. Day to day as needed for reviewing 21 billings, for doing lien releases, for discussing 22 monthly completion or status of the work. If 23 there's issues on the job, try to review labor 24 reports to see how the labor is, because we roll 25 them up and look at our total labor to see how much</p>
<p style="text-align: right;">Page 7</p> <p>1 So it's weighted different by a contract by what's 2 allowed, so it's different. 3 Q. Okay. What steps did you take to 4 investigate the topics in the notice for today's 5 depositions? 6 A. Basically just read some of the paperwork 7 transcripts that were provided from Ray's 8 testimony, or not testimony, but deposition, and 9 basically the filings on the case. 10 Q. Okay. Did you review any other 11 transcripts other than Ray's deposition? 12 A. No. 13 Q. Okay. Now, when you say filings in the 14 case, are you talking about pleadings? 15 A. Pleadings, yeah, and the back and forth 16 with the different filings. So I don't know the 17 legal terminology, but with the whole process our 18 attorneys kept us advised. 19 Q. Okay. Did you take any steps to review 20 any corporate records? 21 A. Not in preparation of this, but recently 22 went through some of the records at the request of 23 our attorney through you for some documents related 24 to some equipment lists. So I went back through 25 everything on that, but just specifically for that.</p>	<p style="text-align: right;">Page 9</p> <p>1 manpower we need. A variance of different things. 2 Q. Did you oversee the submission of the pay 3 applications? 4 A. I did. 5 (Exhibit 1 was marked for 6 identification.) 7 BY MR. JEFFERIES: 8 Q. Sir, showing you what I've marked as 9 Exhibit 1 to your deposition, can you identify this 10 for me, please? 11 A. It's an invoice, and it has a date and a 12 number on it. There was date 4/19/2013, so it's a 13 progress billing. 14 Q. Okay. And that's your signature on 15 page 2? 16 A. Yes, it is. 17 Q. If you would, sir, go to the third page 18 of the exhibit. 19 MR. DOMINA: Randy, if I can interrupt. 20 MR. JEFFERIES: Sure. 21 MR. DOMINA: Is there a reason why these 22 aren't Bates stamped? 23 MR. JEFFERIES: I don't know the answer. 24 MR. DOMINA: Do you know if they've been 25 produced?</p>

<p style="text-align: right;">Page 10</p> <p>1 MR. JEFFERIES: I don't know off the top 2 of my head. I asked Apco to send these over this 3 morning. So I mean, they're your documents, so it 4 shouldn't be a problem. You should have produced 5 them if anybody. 6 MR. DOMINA: I don't know if they are, 7 that's what I'm getting at, you know. That's why 8 we Bates stamp them, to track what's what. But go 9 ahead. 10 BY MR. JEFFERIES: 11 Q. Okay. Helix did prepare Exhibit 1; 12 correct? 13 A. This document, yes. 14 Q. And Helix did submit this to Apco in the 15 ordinary course of the project? 16 A. It definitely appears we did, yes. 17 Q. Okay. And do you assign this pay app a 18 number? 19 A. It's Application 15. 20 Q. Fifteen. Okay. If you would, go to the 21 third page of Exhibit 1. I see line item one is 22 mobilization and line item two are submittals. 23 You've kind of referenced those earlier; correct? 24 A. Correct. 25 Q. Now go to line item 35. It says,</p>	<p style="text-align: right;">Page 12</p> <p>1 answer. My question was not a very clear one. 2 Sitting here today, what would you go review to 3 determine how the line item of \$108,040 for general 4 conditions was prepared? 5 A. How would I review it? 6 Q. Yes. 7 A. When I reviewed this as a senior VP 8 getting this delivered to me? 9 Q. We can do it that way. 10 A. It's not relevant to me. All I care 11 about is what are we billing, what are our overall 12 costs to date. Individual line items is up to the 13 PM to negotiate with his counterpart at Apco. It's 14 not relevant to me how any one of these individual 15 ones are arrived at. 16 Q. Okay. Is there documentation that you 17 could go review within Helix's business records 18 that would show how somebody calculated the 19 \$108,000 for general conditions? 20 A. I don't know that answer. 21 Q. Okay. That line item is -- the general 22 conditions is what Helix is claiming in this case; 23 correct? 24 A. No, we're not claiming this line item. 25 We're claiming general conditions beyond the 108.</p>
<p style="text-align: right;">Page 11</p> <p>1 "General conditions." What does that line item 2 represent? 3 A. It would be anything related to cost to 4 be on site. It could be a whole bunch of stuff. 5 What they comprised into that dollar amount I don't 6 know, but it could be equipment, it could be -- 7 project management could be in there for his time. 8 It could be a number of things. We'd have to find 9 out how the particular project manager built this 10 particular one up. 11 Q. Okay. How would you make that 12 determination? 13 A. For the general conditions? 14 Q. Yeah. 15 A. I wouldn't. The project manager would, 16 so number one. Two, it varies from job to job. 17 You got -- again, I'll go back to you got the 18 contract documents that allow so much to be billed 19 for general conditions, that allow so much for 20 (inaudible), tell you sometimes what you can or 21 cannot put into general conditions. So you're 22 asking me some specifics on something I can't 23 answer here today because I just got numbers and I 24 don't know how the numbers were comprised. 25 Q. Okay. And my question -- I respect your</p>	<p style="text-align: right;">Page 13</p> <p>1 Q. Okay. Your -- strike that. 2 Helix is claiming extended costs above 3 108,000 for the line item general conditions shown 4 in Exhibit 1; correct? 5 A. We are claiming additional general 6 conditions, and if you want to correlate that to 7 this title being general conditions above the 108, 8 then yes, correct. 9 Q. Okay. So my record is clear, sitting 10 here today you can't tell me what time was assumed 11 in that general condition -- strike that. 12 Sitting here today, you can't tell me 13 what time on project Helix assumed in that general 14 conditions line item in Exhibit 1; correct? 15 A. That's not correct. I answered that. It 16 would be the contract duration provided in the bid 17 documents. 18 Q. Okay. 19 A. Which you are privy to and I'm sure you 20 can look it up or we can look it up and let you 21 know at a later date, but that's published 22 information with the bid. 23 Q. Okay. Sitting here today, you can't tell 24 me what cost components go into that \$108,000 25 general condition line item in Exhibit 1, can you?</p>



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16 *Attorneys for Plaintiff*
17 *HELIX ELECTRIC OF NEVADA, LLC*

18 **DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

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

22 Plaintiff,

23 vs.

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

28 Defendants.

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

**JOINT PRE-TRIAL
MEMORANDUM**

29 Pursuant to Nev. R. Civ. P. 16.1(a)(3) and EDCR 2.67, Plaintiff, HELIX ELECTRIC OF
30 NEVADA, LLC ("Helix"), by and through its attorneys, PEEL BRIMLEY LLP and Defendants,
31 APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF AMERICA
32 ("Safeco"), by and through their attorneys, FENNEMORE CRAIG, P.C., submit the following
33 Pretrial Memorandum to the Court:

34 ///

35 ///

36 ///

1 **A. STIPULATED STATEMENT OF FACTS¹:**

2 This matter arises from the construction of the Craig Ranch Regional Park Phase II
3 (“Project”) for the City of North Las Vegas (“CNLV”). In the spring of 2012, APCO entered into
4 a construction agreement (“Prime Contract”) with CNLV wherein APCO agreed to serve as the
5 general contractor on the Project. On or about April 4, 2012, Helix entered into an agreement with
6 APCO (“Subcontract”) wherein Helix agreed to provide certain electrical related labor, materials
7 and equipment (the “Work”) to the Project for the lump sum amount of \$2,356,520.00. Pursuant
8 to the provisions of NRS 339.025, Safeco, as surety, and APCO, as principal, executed and
9 delivered a Labor and Material Payment Bond, No. 024043470. The Project was originally
10 scheduled to be completed on January 9, 2013. Through no fault of APCO or Helix, the Project
11 encountered delays and was not substantially completed until October 25, 2013. Helix claims it
12 is owed \$134,724.68 for extended overhead costs. APCO disagrees that Helix is owed any money
13 for extended overhead costs.

14 **B. LIST OF CLAIMS**

15 **First Claim for Relief:**

Breach of Contract Against APCO
(Paragraphs 13 through 20)

17 **Second Claim for Relief:**

Breach of Implied Covenant of Good
Faith & Fair Dealing Against APCO
(Paragraphs 21 through 25)

19 **Third Claim for Relief:**

Unjust Enrichment or in the
Alternative *Quantum Meruit* Against
APCO
(Paragraphs 26 through 34)

22 **Fourth Claim for Relief:**

Violation of NRS 338.550 Against
APCO
(Paragraphs 3 through 8 (sic))

24 **Fifth Claim for Relief:**

Claim Against Payment Bond Against
Safeco

26 ¹ Pursuant to EDCR 2.67, the Parties have stipulated to a “brief statement of the facts of the case”.
27 For those facts and legal issues that are disputed, the Parties have agreed to include them in their
28 competing proposed Findings of Fact and Conclusions of Law which each Party will provide the
Court prior to the commencement of trial. By including stipulated facts only in this Pretrial
Memorandum, neither party waives their ability to raise those disputed facts or legal issues at
trial.

(Paragraph 35)

C. DAMAGES AND THEORIES OF RECOVERY

Helix claims APCO breached the Subcontract Agreement and violated NRS 338.500 to 338.645.00, inclusive, when APCO failed to pay Helix for the extended general conditions contained within the Change Orders. Helix asserts it has been damaged in the amount of \$134,724.68 and further seeks interest and attorneys' fees and costs.

D. LIST OF AFFIRMATIVE DEFENSES

APCO's Affirmative Defenses:

First Affirmative Defense:

Plaintiff's claims, and each of them, are barred by the applicable statute of limitation.

Second Affirmative Defense:

Plaintiff has failed to state a claim upon which relief can be granted.

Third Affirmative Defense:

Plaintiff is not equitably entitled to obtain any money from Defendant.

Fourth Affirmative Defense:

Plaintiff's claims against Defendant fail as a matter of law because Plaintiff is not a beneficiary under the bond.

Fifth Affirmative Defense:

The claims, and each of them, are barred by the failure of the Plaintiff to plead those claims with particularity

Sixth Affirmative Defense:

The claims, and each of them, are barred as a result of the failure of the Plaintiff to timely make those claims against Defendant and allow Defendant to collect evidence sufficient to establish its nonliability. Defendant relied upon Plaintiffs failure to allege these claims and, as a result, Plaintiff is barred by the doctrine of laches.

Seventh Affirmative Defense:

Insofar as any alleged breach of contract is concerned, Plaintiff failed to give this answering Defendant timely notice thereof.

1	Eighth Affirmative Defense:	Answering Defendant has not breached any contract.
2		
3	Ninth Affirmative Defense:	Answering Defendant has substantially performed the contract.
4		
5	Tenth Affirmative Defense:	Answering Defendant was justified in his failure to perform, if any.
6		
7	Eleventh Affirmative Defense:	The claims of Plaintiff have been waived as a result of the acts and the conduct of the Plaintiff.
8		
9	Twelfth Affirmative Defense:	The claims for breach of contract are barred as a result of the failure to satisfy conditions precedent.
10		
11	Thirteenth Affirmative Defense:	Answering Defendant at all times herein acted reasonably and in good faith in discharging its obligations and duties, if any.
12		
13	Fourteenth Affirmative Defense:	These answering Defendant acted in conformity with the law and with reasonableness in discharging its duties.
14		
15	Fifteenth Affirmative Defense:	Plaintiff has received everything it was entitled to receive from its agreement with answering Defendant.
16		
17	Sixteenth Affirmative Defense:	The answering Defendant has properly and legally fulfilled its duties and obligations, if any, to the Plaintiff.
18		
19	Seventeenth Affirmative Defense:	Plaintiffs contractual causes of action are barred by Plaintiffs own anticipatory breach of its contractual duties to answering Defendant, which breach relieved answering Defendant of any and all contractual obligations or promises to Plaintiff (which obligations and promises answering Defendant denies).
20		
21		
22		
23		
24		
25		
26	Eighteenth Affirmative Defense:	Answering Defendant fulfilled its duty to deal with Plaintiff in good faith.
27		
28		

1	Nineteenth Affirmative Defense:	Answering Defendant committed no intentional acts meant to disrupt or harm Plaintiff.
2		
3	Twentieth Affirmative Defense:	No disruption or harm occurred to Plaintiff.
4		
5	Twenty-First Affirmative Defense:	Plaintiffs cause of action for breach of the covenant of good faith and fair dealing is barred because Plaintiff breached its reciprocal covenant of good faith and fair dealing.
6		
7		
8	Twenty-Second Affirmative Defense:	The Plaintiff did not confer any benefit upon answering Defendant by either substantially performing or satisfying conditions precedent to the contract.
9		
10		
11	Twenty-Third Affirmative Defense:	Answering Defendant has made all necessary payments or abided by all necessary provisions to Plaintiff.
12		
13	Twenty-Fourth Affirmative Defense:	Answering Defendant has not retained any benefit which in equity and good conscience belongs to Plaintiff.
14		
15	Twenty-Fifth Affirmative Defense:	To the extent that answering Defendant has not received any benefits from Plaintiff, answering Defendant has not been unjustly enriched.
16		
17		
18	Twenty-Sixth Affirmative Defense:	Plaintiff is not equitably entitled to obtain any money from Defendant.
19		
20	Twenty-Seventh Affirmative Defense:	Plaintiff is not entitled to the reasonable value of any services.
21		
22	Twenty-Eighth Affirmative Defense:	There is no reasonable value for Plaintiffs services because Plaintiff damaged Defendant.
23		
24	Twenty-Ninth Affirmative Defense:	Defendant has not retained any benefit, money or property against fundamental principles of justice, equity, and good conscience.
25		
26		
27	Thirtieth Affirmative Defense:	Plaintiff's claims are merely conjecture and speculation.
28		

Thirty-First Affirmative Defense: Defendant has not failed nor refused to timely pay Helix monies due and owing.

Thirty-Second Affirmative Defense: Plaintiff has not been damaged.

Thirty-Third Affirmative Defense: Plaintiff first breached the contract agreement by not abiding by its terms of submission of invoicing or payment.

Thirty-Fourth Affirmative Defense: Plaintiff's claims, and each of them, are barred as a result of an accord and satisfaction and release.

Thirty-Fifth Affirmative Defense: Plaintiff's claims are barred, in whole or in part, by the parol evidence rule.

Thirty-Sixth Affirmative Defense: Any and all actions complained of by Plaintiff were approved or ratified by Plaintiff.

Thirty-Seventh Affirmative Defense: Pursuant to Nev. R. Civ. P. 11, as amended, all possible affirmative defenses may not have been alleged herein, in so far as sufficient facts were not available after a reasonable inquiry upon the filing of these Defendants' Answer to Plaintiffs Complaint; therefore, these Defendants reserve the right to amend its answer to allege additional affirmative defenses if subsequent investigations so warrant.

SAFECO's Affirmative Defenses:

First Affirmative Defense: Safeco's liability for payment under the bond, if any, is limited to the penal sum of the bond in accordance with Nevada law.

Second Affirmative Defense: Safeco's liability, if any, on a supporting bond is limited to APCO's failure, if any, to perform or pay under a contract for which the bond was issued. To that end, Safeco incorporates by reference APCO's answer and affirmative defenses.

Third Affirmative Defense: Plaintiff has failed to satisfy all conditions precedent to recovery under the subject bond.

Fourth Affirmative Defense: Plaintiff has failed to mitigate its damages,

1 if any.
2 **Fifth Affirmative Defense:** Plaintiff's claims are precluded by the
3 applicable statute of limitations.
4
5 **Sixth Affirmative Defense:** Plaintiff's claims are precluded by the
6 doctrines of laches and unclean hands.
7
8 **Seventh Affirmative Defense:** APCO performed, satisfied and
9 discharged all of its duties and obligations
10 it may have owed Plaintiff, which arose
11 out of any and all agreements, contracts or
12 representations, unless and until prevented
13 from further doing so, and thereby
14 extinguished and fully discharged all such
15 duties and obligations, if any.
16
17 **Eighth Affirmative Defense:** Plaintiff failed to comply with its notice
18 obligations as set forth in Nevada law
19 and/or in the applicable contracts or
20 agreements.

21 **E. LIST OF CLAIMS/DEFENSES TO BE ABANDONED**

22 None.

23 **F. PROPOSED AMENDMENTS TO THE PLEADINGS**

24 Helix is voluntarily reducing its claim from \$138,151 down to \$134,724.68 to account
25 for the removal of the forklift charge for March 2013.

26 **G. LIST OF JOINT EXHIBITS**

27 See **Exhibit "1"** attached hereto for a complete list of proposed Exhibits and Objections
28 thereto.

H. LIST OF WITNESSES

Helix intends to call the following witnesses at trial:

1. Robert Johnson (Helix)
2. Victor Fuchs (Helix)
3. Rainer Prietzel (Helix)
4. Kurk Williams (Helix)
5. Joemel Llamado, City of North Las Vegas

6. Any and all witnesses listed by the Defendant.

7. Helix further reserve the right to introduce the deposition testimony of any witness identified by any other party deemed not available for trial pursuant to the Nevada Rules of Civil Procedure and the Nevada Rules of Evidence.

APCO and Safeco intend to call the following witnesses at trial:

1. Person Most Knowledgeable, APCO

2. Joe Pelan, APCO

3. Mary Jo Allen, APCO

4. Mark Yoakum,

5. Brian Benson

6. APCOAPCO and Safeco reserve the right to call any person identified by any other party.

7. APCO and Safeco further reserve the right to introduce the deposition testimony of any witness identified by any other party deemed not available for trial pursuant to the Nevada Rules of Civil Procedure and the Nevada Rules of Evidence.

I. AGREEMENTS AS TO THE LIMITATION OR EXCLUSION OF EVIDENCE

The parties have entered into no agreement as to the limitation or exclusion of evidence.

J. CONTESTED AT TRIAL

Helix asserts the following are issues of law that may be contested at the time of trial.

1. Whether APCO breached the contract and/or the covenant of good faith and fair dealing when it falsely informed Helix that the City of North Las Vegas (“CNLV”) rejected Helix’s Change Order Requests for extended overhead costs due to lack of backup documents and untimeliness.

2. Whether APCO breached the contract or breached the covenant of good faith and fair dealing when it failed to supplement its Claim for extended general conditions to CNLV and include Helix's Claim for extended overhead costs.

3. Whether APCO breached the contract and/or breached the covenant of good faith and fair dealing when it settled its Claim for extended general conditions with CNLV, thus cutting off Helix's ability to receive payment for its Claim from CNLV.

4. Whether by entering into the global settlement agreement with CNLV, APCO was either (i) paid for Helix's Claim; or (ii) settled any pass-through claim Helix had against CNLV, and therefore became responsible to ensure Helix was paid its claim for extended overhead costs.

5. Whether the Conditional Waiver and Release Upon Final Payment ("Conditional Release") is applicable or enforceable since APCO did not make payment to Helix until a year after Helix provided the Conditional Release and Helix incurred additional damages during that time.

6. Whether Helix rescinded the Conditional Release before APCO made payment for those amounts and whether through its actions of submitting Helix's Claim to CNLV, APCO acknowledged that the Conditional Release did not apply to Helix's claim for extended overhead costs.

7. Whether NRS 338 invalidates the Conditional Waiver because APCO (i) failed to pay Helix its retention within ten (10) days of receiving its Retention from CNLV; (ii) failed to pay Helix its statutorily required interest for wrongfully withholding the Retention for four months after APCO received its Retention payment from CNLV; and (iii) attempts to use the Conditional Waiver to bar Helix from asserting its Claims for delay damages which were so unreasonable in length as to amount to an abandonment of the public work, thus rendering the Conditional Release, against public policy, void and unenforceable.

8. Whether APCO violated NRS 338 when it failed to timely pay Helix its undisputed contract balance and retention after it was paid in full by CNLV.

APCO and Safeco assert that the following are issues of law that may be contested at the time of trial:

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

1. Whether Helix made a timely and properly supported claim for extended general damages.
2. Whether Helix waived its rights to pursue further claims on the Project once it negotiated the final payment check in accordance with the executed Conditional Waiver and Release Upon Final Payment without reserving any claims.
3. Whether Helix actually incurred any actual extended general condition costs.
4. Whether Helix can recover alleged amount claimed for extended general conditions pursuant to the "no damages for delay" and other provisions of the subcontract.
5. Whether the claim payment schedule Helix requested be added to the subcontract with APCO is enforceable.
6. Whether Helix is entitled to any recovery for the time period that the City determined was not compensable.
7. Whether Helix's sole remedy, if any, is limited to an extension of time to complete the subcontract work.

K. ESTIMATED TIME FOR TRIAL

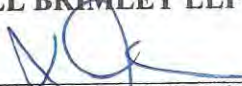
2-3 days

L. SPECIAL CONSIDERATIONS

None.

Dated this 24 day of May, 2019.

PEEL BRIMLEY LLP


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*Attorneys for APCO CONSTRUCTION, INC.
and SAFECO INSURANCE COMPANY OF
AMERICA*

Exhibit 1

Case No.: **A-16-730091-C**

Trial Date: **June 3, 2019**

Dept. No.: **XI**

Judge: **The Honorable Judge Gonzalez**

Plaintiff: **Helix Electric of Nevada, LLC**

Court Clerk: _____

Recorder: _____

Counsel for Plaintiff: **Cary B. Domina, Esq. of the law
firm of Peel Brimley LLP**

vs.

Defendant: **APCO Construction; Safeco
Insurance Company of Nevada**

Counsel for Defendant: **John Randall Jefferies, Esq.
Of the law firm of Fennemore Craig, P.C**

TRIAL BEFORE THE COURT

JOINT EXHIBITS

Exhibit Number	Bates No.(s)	Exhibit Description	Date Offered	Objection	Date Admitted
1.	APCO0000001– APCO0000003	APCO Craig Ranch Regional Park – Phase II Project Change Order Log			
2.	APCO000479– APCO000731	Certified Payroll Reports			
3.	APCO000437– APCO000438	Pages 44–45 of the Prime Contract			
4.	APCO000166– APCO000436	Daily Sign In Log			
5.	APCO000732– APCO001068	Helix Daily Reports			
6.	HEL000659– HEL000725	Helix Daily Reports – supplement			
7.	HEL000450	December 20, 2011 Performance Bond			
8.	HEL000451	December 20, 2011 Labor and Material Payment Bond			
9.	HEL000452– HEL000453	December 20, 2011 Guarantee Bond			
10.	APCO001269– APCO001281; APCO001335	March 15, 2012 Graybar Electric Purchase Order			
11.	APCO000439– APCO000478	April 4, 2012 Craig Ranch Regional Park – Phase II Subcontract Agreement			
12.	HEL000456– HEL000458	January 28, 2013 Letter from Kurk Williams to Brian Bohn regarding Schedule delay/Extended overhead			

EXHIBIT(S) LIST

		(Bob Johnson Deposition Ex. 7)			
13.	APCO000059– APCO000060	January 29, 2013 Email to Helix from APCO RE Schedule Delay			
14.	HEL00531–HEL00536	April 19, 2013 Helix's Invoice No. 16113–015 in the amount of \$157,890.00 (Bob Johnson Depo Ex. 1)			
15.	APCO000008– APCO000019	Correspondence from APCO to CNLV dated May 9, 2013			
16.	APCO001323– APCO001328	May 20, 2013 Invoice # 161113–016 for \$157,130.00, Application and Certificate for Payment, and Conditional Waivers (Bob Johnson Deposition Ex. 2)			
17.	HEL000461	Correspondence from Helix to APCO dated June 19, 2013 regarding Extended Overhead Costs			
18.	APCO000040– APCO000041	June 19, 2013 APCO Email between Brian Bohn (APCO) and Kurk Williams (Helix)			
19.	APCO000052– APCO000054	June 21, 2013 Email to Joe Pelan and Brian Bohn from Kurk Williams RE: Craig Ranch Delay Notice (Helix)			
20.	HEL000464– HEL000468	August 27, 2013 Helix Electric Invoice to APCO RE: Extended Overhead for a Total of \$111,847.00			
21.	APCO000106– APCO000115	September 3, 2013 COR #68 & CNLV Response and Letter from APCO to Helix requesting back–up to substantiate amount			
22.	APCO0000006– APCO0000007; APCO0000005	Correspondence from CNLV to APCO dated October 2, 2013			
23.	APCO001329– APCO001333	October 18, 2013 Invoice # 161113–021 for \$129,973.50, Application and Certificate for			

EXHIBIT(S) LIST

		Payment, and Conditional Waivers (Bob Johnson Deposition Ex. 4)			
24.	APCO000066– APCO000070	October 18, 2013 Application and Certificate for Payment and Conditional Waiver and Release Upon Final Payment			
25.	APCO000117– APCO000130	November 6, 2013 COR #68.1 & CNLV Response			
26.	APCO000132– APCO000140	November 18, 2013 COR #93 & CNLV Response			
27.	HEL000251– HEL000254	January 28, 2014 Email to Victor Fuchs and Bob Johnson from Joe Pelan RE: Craig Ranch – Scheduled Meeting on February 4			
28.	APCO000038	March 17, 2014 City of Las Vegas Construction Conflict Authorization No. 00062 to APCO			
29.	HEL000255– HEL000257	April 16, 2014 Email to Victor Fuchs from Joe Pelan RE: Craig Ranch Park – Restoration			
30.	HEL000493– HEL000519	City Council Meeting Minutes (July 2, 2014)			
31.	HEL000426	July 8, 2014 Proof of recordation of Notice of Completion			
32.	HEL00537	Correspondence from Helix to APCO dated September 26, 2014 regarding Demand for Payment			
33.	HEL00538–HEL000541	October 15, 2014 Email from Kurk Williams to Eddie Bennett FW: Craig Ranch Delay Notice (Helix)			
34.	APCO000079– APCO000080	October 21, 2014 Check #1473 for \$105,679.00 to Helix Electric from APCO			
35.	APCO000071– APCO000074	October 29, 2014 Email from APCO to Helix regarding Check and attachments			
36.	APCO000075– APCO000078	October 29, 2014 Email exchange between Helix and APCO			

EXHIBIT(S) LIST

37.	APCO001334	October 29, 2014 copy of posted check #1473 for \$105,679.00 to Helix Electric from APCO (Bob Johnson Deposition Ex. 10)			
38.	HEL000382– HEL000383	October 29, 2014 Email to Victor Fuchs from Joe Pelan RE: Craig Ranch Change Approval			
39.	HEL000427	October 29, 2014 APCO Construction Unconditional Waiver and Release Upon Final Payment			
40.	APCO001322	Bank of Nevada to APCO Business Analysis Account with October 29, 2014 check detail			
41.	APCO000081– APCO000082	October 30, 2014 Email from Helix to APCO with executed Unconditional			
42.	HEL000405– HEL000407	October 30, 2014 Unconditional Waiver and Release Upon Final Payment, Letter Helix to APCO RE: 10/29/2014 Unconditional Waiver and Release Upon Final Payment, and Invoice for Extended Overhead for a Total of \$138,151.00			
43.	HEL000490– HEL000491; HEL000489	Correspondence from Helix to APCO dated October 30, 2014 regarding Unconditional Waiver			
44.	HEL000415– HEL000419	January 13, 2015 Email to Joe Pelan from Victor Fuchs RE: Promissory Note			
45.	HEL000479– HEL000481; HEL000477– HEL000478	December 14, 2015 Email String regarding Promissory Note (with Promissory Note attached)		APCO Objection: Rule 408	
46.	APCO000063– APCO000064	December 18, 2015 Letter to Cary Domina from Joe Pelan RE: Craig Ranch Park – Phase II			
47.	APCO001088– APCO001090	January 18, 2016 Email Exchange between Joe			

EXHIBIT(S) LIST

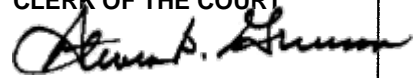
		Pelan & Bob Johnson after Complaint was Filed			
48.	APCO000141	January 18, 2016 Email to Victor Fuchs from Joe Pelan RE: Claim			
49.	HEL00542–HEL00550	January 29, 2016 Email from Bob Johnson to Joe Pelan RE: Claim			
50.	HEL00551–HEL00658	Craig Ranch Cost Report			
51.	HEL000001– HEL000205	Job Costs Reports			
52.	APCO001091– APCO001095	Helix Pay Application #11 dated December 31, 2012			
53.	APCO001096– APCO001104	Helix Pay Application #12 dated January 31, 2013			
54.	APCO001105– APCO001109	Helix Pay Application #13 dated February 28, 2013			
55.	APCO001110– APCO001114	Helix Pay Application #14 dated March 31, 2013			
56.	APCO001115– APCO001120	Helix Pay Application #15 dated April 30, 2013			
57.	APCO001121– APCO001126	Helix Pay Application #16 dated May 31, 2013			
58.	APCO001127– APCO001131	Helix Pay Application #17 dated June 30, 2013			
59.	APCO001132– APCO001136	Helix Pay Application #18 dated July 31, 2013			
60.	APCO001137– APCO001141	Helix Pay Application #19 dated August 31, 2013			
61.	APCO001142– APCO001146	Helix Pay Application #20 dated September 30, 2013			
62.	APCO001147– APCO001151	Helix Pay Application #21 dated October 31, 2013			
63.	APCO001152– APCO001156	Helix Pay Application #22 (billing #1) dated October 31, 2013			
64.	APCO001157– APCO001160	Helix Pay Application #22 (billing #2) dated October 31, 2013			
65.	APCO001161– APCO001164	Helix Pay Application #22 (billing #3) dated October 31, 2013			
66.	APCO001165	Helix Change Order Log			
67.	APCO001166– APCO001173	APCO COR #5			
68.	APCO001174– APCO001185	APCO COR #57			

EXHIBIT(S) LIST

69.	APCO001186– APCO001201	APCO COR #58			
70.	APCO001202– APCO001209	APCO COR #59			
71.	APCO001210– APCO001222	APCO COR #61			
72.	APCO001223– APCO001229	APCO COR #64			
73.	APCO001230– APCO001236	APCO COR #65			
74.	APCO001237– APCO001243	APCO COR #70			
75.	APCO001244– APCO001251	APCO COR #71			
76.	APCO001252– APCO001258	APCO COR #75			
77.	APCO001259– APCO001268	APCO COR #77			
78.	N/A	December 28, 2016 Defendants First Request for Production of Documents and Things to Helix Electric of Nevada		Helix Objects (Pleadings/Court Documents)	
79.	APCO000055– APCO000056	August 15, 2017 Affidavit of Mark Yoakum		Helix Objects (Affidavit no chance to cross)	
80.	APCO000057– APCO000058	September 7, 2017 Affidavit of Joemel Llamado		Helix Objects (Affidavit no chance to cross)	
81.	N/A	October 13, 2017 Defendants' Second Request for Production of Documents and Things to Helix Electric of Nevada, LLC		Helix Objects (Pleadings/Court Documents)	
82.	N/A	October 22, 2018 Fourth Amended Notice of Taking NRCP Rule Deposition of Person Most Knowledgeable for Helix		Helix Objects (Pleadings/Court Documents)	
83.	APCO001282– APCO001293	Helix Electric Labor Costs per Certified Payroll Reports		Helix Objects (Demonstrative)	
84.	APCO001294– APCO001298	Helix Electric Labor Costs per Certified Payroll Reports (February 2013– November 2013)		Helix Objects (Demonstrative)	
85.	APCO001299– APCO001301	Helix Electric Certified Payroll Summary of Hours and Gross Pay & Fringe Benefits for		Helix Objects (Demonstrative)	

EXHIBIT(S) LIST

		Richard Clement and Rainer Prietzel			
86.	APCO001302– APCO001317	Helix Electric Sign in Log and Certified Payroll Hours (January 2012– November 2013)		Helix Objects (Demonstrative)	
87.	APCO001318	Helix Billed Amounts for General Conditions vs. Comparison to Helix Partial Job Cost		Helix Objects (Demonstrative)	
88.	APCO001319– APCO001321	Helix Electric Labor Costs per Certified Payroll Reports for Rainer Prietzel		Helix Objects (Demonstrative)	



1 **OPP**

2 RICHARD L. PEEL, ESQ.
3 Nevada Bar No. 4359
4 CARY B. DOMINA, ESQ.
5 Nevada Bar No. 10567
6 JEREMY D. HOLMES, ESQ.
7 Nevada Bar No. 14379

8 **PEEL BRIMLEY LLP**

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11 Telephone: (702) 990-7272
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13 rpeel@peelbrimley.com
14 cdomina@peelbrimley.com
15 jholmes@peelbrimley.com

16 *Attorneys for Plaintiff Helix Electric of Nevada, LLC*

17 **DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

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

21 Plaintiff,

22 vs.

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

28 Defendants.

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

**HELIX ELECTRIC OF NEVADA,
LLC'S OPPOSITION TO APCO
CONSTRUCTION'S AND SAFECO
INSURANCE COMPANY OF
AMERICA'S MOTION TO
EXCLUDE THE TESTIMONY OF
KURT WILLIAMS**

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 to Exclude the Testimony of Kurt Williams (the "Motion").

///

///

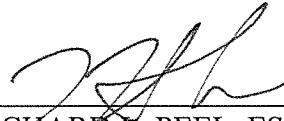
///

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

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

4 Dated this 31st day of May 2019.

5 **PEEL BRIMLEY LLP**

6 

7 **RICHARD L. PEEL, ESQ.**

8 Nevada Bar No. 4359

9 **CARY B. DOMINA, ESQ.**

10 Nevada Bar No. 10567

11 **JEREMY D. HOLMES, ESQ.**

12 Nevada Bar No. 14379

13 3333 E. Serene Avenue, Suite 200

14 Henderson, NV 89074-6571

15 Phone: (702) 990-7272

16 *Attorneys for Helix Electric of Nevada, LLC*

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

APCO recently sought to prevent Helix from introducing any evidence to support its claims due to APCO's own failure to properly question Helix's 30(b)(6) witness. Since that request was wholly denied, APCO now seeks to prevent one of Helix's fact witnesses from testifying at trial. APCO believes such relief is proper because Kurt Williams was not produced as Helix's 30(b)(6) witness. Conspicuously, APCO does not inform the Court in its Motion that Mr. Williams was released from his employment with Helix in 2015. Instead, APCO argues that Helix should have produced Mr. Williams, a former Helix employee, as its 30(b)(6) witness and cites to cases where courts have precluded current employees of corporations from testifying if they were not designated as 30(b)(6) witnesses.

Mr. Williams' involvement in the Project has never been a secret, nor has his designation as a witness for Helix, yet APCO never sought to depose Mr. Williams. Instead, APCO only sought to depose Helix's 30(b)(6) witness. Even when offered a final attempt to depose Mr. Williams as a courtesy, APCO refused. Quite simply, if APCO is prejudiced by Mr. Williams' testimony, the only party to blame is APCO itself for failing to depose Mr. Williams when it had the chance. Instead, due to its own failures, APCO once again wants to prevent the truth about what happened from coming out at trial. The relief requested in the Motion is not warranted and certainly not necessary and the Motion should be denied.

II. STATEMENT OF FACTS

Pursuant to the Scheduling Order the Discovery Commissioner issued on January 3, 2018, all parties were to complete discovery by April 27, 2018. Helix deposed two witnesses prior to this date, whereas APCO had not noticed a single deposition. APCO did not notice its first deposition until July 3, 2018, several months after discovery closed in this case, which was permitted by Helix's counsel out of professional courtesy. At no point prior to discovery closing, or in the many months afterwards when APCO became interested in taking depositions, did APCO attempt to depose anyone other than Helix's 30(b)(6) representative.

At some point in 2015, approximately 3 years prior to APCO noticing the deposition of Helix's 30(b)(6) witness, Mr. Williams was released from his position at Helix. Mr. Williams, however, was still listed as a fact witness in Helix's initial disclosures.¹ Due to Mr. Williams no longer being employed by Helix for several years prior to the deposition being noticed, Helix did not produce Mr. Williams to testify on Helix's behalf as its 30(b)(6) witness. Instead, Helix produced both the superintendent who worked on the Project under Mr. Williams, Mr. Prietzel, and Helix's Vice-President, Mr. Johnson. While APCO has alleged these witnesses were unprepared and uneducated regarding the noticed topics, as was shown in Helix's Opposition to APCO's Motions in Limine 3-4, this was not the case. Mr. Prietzel's knowledge was, admittedly, limited to the day-to-day operations of the Project, but Mr. Johnson had abundant knowledge regarding the remaining topics and testified properly on the few occasions he was asked appropriate and relevant questions.

After the hearing on APCO's Motions inf Limine 3-4 on May 13, 2019, Helix's Counsel nevertheless offered to allow APCO to depose Mr. Williams. APCO refused to do so.

III. LEGAL ARGUMENTS

Mr. Williams no longer works for Helix. In fact, Mr. Williams has not worked for Helix since 2015. Despite knowing this, APCO decided not to give the Court this information in its Motion. Instead, APCO made it appear as if Helix has simply been hiding Mr. Williams, improperly withholding him from APCO's efforts to depose Helix's 30(b)(6) representative and waiting to ambush APCO with Mr. William's testimony at trial. The fact that Mr. Williams has not been employed by Helix in years readily distinguishes this case from the factual scenarios where these motions typically arise and renders the cases APCO cites in support of its Motion wholly irrelevant.

Now that the Court has been given the truth about Mr. Williams, it becomes apparent that APCO is actually requesting that this Court interpret Rule 30(b)(6) as requiring Helix to produce a former employee as its person most knowledgeable. APCO provides no case law to support such a requirement. While Helix could locate no relevant cases interpreting NRCP 30(b)(6), under FRCP 30(b)(6) as a general rule an "organization cannot be compelled to produce [former employees] for

¹ A true and correct copy of Helix's Initial Disclosures filed on October 2, 2017 is attached hereto as Exhibit 1.

1 deposition.” *Rundquist v. Vapiano SE*, 277 F.R.D. 205, 208 (D.D.C. 2011) (citing *Simms v. Center*
2 *for Correctional Health and Policy Studies*, 272 F.R.D. 36, 41 (D.D.C.2011) (“[G]enerally, a party
3 cannot notice a deposition of a former director or employee under Rule 30(b)(6). If plaintiff wishes
4 to compel specific witnesses to testify, therefore, she must subpoena them pursuant to Federal Rules
5 of Civil Procedure 30(a)(1) and 45.” (internal citations omitted)). Exceptions to that general rule
6 exist when employees are terminated solely for the purpose of avoiding being designated and forced
7 to testify pursuant to 30(b)(6). *Id.* Mr. Williams, however, was let go before this case even begun,
8 and his termination had nothing to do with trying to circumvent a deposition notice issued 3 years
9 after the fact.

10 It is obvious why requiring a corporation to present a former employee to testify and bind
11 the corporation at a 30(b)(6) deposition is generally not permitted; a corporation has no control
12 over a former employee, and a former employee has no incentive to testify truthfully on behalf of
13 the corporation, particularly if they did not leave the corporation on mutual terms. Furthermore, a
14 corporation’s counsel has no attorney-client relationship with a former employee of the corporation,
15 and, as a result, no attorney-client privilege to discuss potentially sensitive matters. It is hard to
16 imagine a situation where a corporation would willingly provide an employee it terminated to bind
17 it in future litigation, yet this is the requirement that APCO begs this Court to adopt. Such a radical
18 transformation of Rule 30(b)(6) is not warranted, especially under the facts of this case.

19 Instead of addressing these glaring issues, APCO bases the entirety of its Motion on the
20 holding of one case, *Reilly v. Natwest Markets Group Inc.*, 181 F.3d 253 (2d Cir. 1999). In *Reilly*,
21 the defendant produced 30(b)(6) witnesses with limited knowledge on important topics, while
22 withholding more knowledgeable employees until seeking to introduce them as fact witnesses at
23 trial. *Id.* at 268–269. To determine whether exclusion of the witnesses was proper, the court
24 considered the following factors:

- 25 (1) The party’s explanation for the failure to comply with the
26 discovery order; (2) the importance of the testimony of the precluded
27 witness; (3) the prejudice suffered by the opposing party as a result
28 of having to prepare to meet the new testimony; and (4) the
possibility of a continuance.

1 *Id.* at 269.

2 The court found the defendant's tactics violated both Rule 30(b)(6) and the district court's
3 discovery order. *Id.* Due to those violations, the fact that the testimony of these additional witnesses
4 would have been cumulative in addition to defendant's expert witness, and the fact the plaintiff
5 never had an opportunity to depose the new witnesses, the court ruled excluding their testimony on
6 those topics was proper. *Id.*

7 The situation faced by the Second Circuit in *Reilly* bears no resemblance to the facts before
8 this Court and does not warrant relief under the test used in *Reilly*. First, unlike the defendant in
9 *Reilly*, Helix has not failed to comply with any discovery order from this Court. Moreover, Mr.
10 Williams was not produced as Helix's 30(b)(6) witness for the simple fact that Mr. Williams was
11 let go by Helix years ago and Helix is not required to produce a former employee in response to a
12 30(b)(6) deposition notice. Next, Helix did not withhold employees with superior knowledge from
13 APCO when APCO sought to depose Helix's person most knowledgeable, as Mr. Williams is not
14 an employee of Helix. Nor is the planned testimony of Mr. Williams largely unimportant and
15 cumulative, as were the proposed witnesses in *Reilly*.

16 Next, APCO only has itself to blame for any prejudice it may suffer due to Mr. Williams'
17 testimony. Rather than affirmatively seek to depose persons involved in the Project and Helix's
18 claim, APCO did nothing until several months *after* discovery closed in this case. Even then, APCO
19 only sought to depose Helix's person most knowledgeable, rather than any other key fact witnesses.
20 After APCO complained for the first time about Mr. Williams testifying at trial on May 13, 2019,
21 Helix offered to allow APCO to depose Mr. Williams, but APCO refused to do so. Mr. Williams'
22 name appears on practically every document relevant to Helix's claim and has been listed as a
23 witness for Helix throughout the duration of this case. Yet, for whatever reason, APCO decided not
24 to depose Mr. Williams. Instead, APCO once again did nothing; waiting until the eve of trial to cry
25 foul about Mr. Williams being called to testify.

26 None of the facts pertinent to the court's decision in *Reilly* are present here. Unlike the
27 plaintiff in *Reilly* who aggressively and properly pursued proper witnesses but was thwarted by
28 improper tactics, APCO did nothing until months after discovery closed and, when granted a

1 reprieve by Helix, did only the bare minimum. The one thing that prevented APCO from learning
2 everything Mr. Williams would testify about at trial is APCO itself. As a result, not a single one of
3 the factors set forth in *Reilly* favor granting APCO's Motion.

4 Instead of seeking leave to depose Mr. Williams, or some other relief to remedy its
5 continued failures to properly depose persons in this matter, APCO regurgitates the same arguments
6 it made in its Motions in Limine 3-4. These arguments were made at length in the pleadings and at
7 oral argument for those motions. After careful consideration, this Court did not find that Helix had
8 violated 30(b)(6), and instead denied APCO's motions entirely. APCO argues that Mr. Williams
9 cannot be brought in now to "rehabilitate" Helix's 30(b)(6) witnesses, despite the fact that, as was
10 argued at length in Helix's Opposition to APCO's Motions in Limine, Mr. Johnson adequately
11 testified as to Helix's claim on the very few occasions APCO actually asked relevant and
12 appropriate questions. Instead, APCO focused almost entirely on items that are not included in
13 Helix's claim and documents that APCO was told multiple times were not used to construct Helix's
14 claim.

15 APCO's concerns arising from its failure to properly depose Helix's 30(b)(6) witness have
16 already been heard and decided upon by this Court. The issue before the Court now is whether
17 Helix should be heavily sanctioned due to APCO's bewildering decision not to depose a key fact
18 witness. As discussed at length above, the answer to that question is a resounding no and APCO's
19 Motion should be denied.

20 ///

21 ///

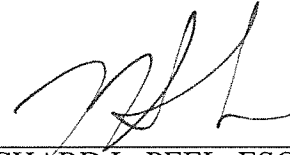
22 ///

1 **IV. CONCLUSION**

2 Because Helix is not required to designate a terminated employee as its 30(b)(6) witness,
3 none of the factors in the *Reilly* test favor exclusion, and APCO could have deposed Mr. Williams
4 in his individual capacity at any time, this Court should deny APCO's Motion.

5 Dated this 31st day of May 2019.

6 **PEEL BRIMLEY LLP**

7 

8 _____
9 RICHARD L. PEEL, ESQ.
10 Nevada Bar No. 4359
11 CARY B. DOMINA, ESQ.
12 Nevada Bar No. 10567
13 JEREMY D. HOLMES, ESQ.
14 Nevada Bar No. 14379
15 3333 E. Serene Avenue, Suite 200
16 Henderson, Nevada 89074-6571
17 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 31st day of March 2019, I caused the above and foregoing document entitled **HELIX ELECTRIC OF NEVADA, LLC'S OPPOSITION TO APCO CONSTRUCTION'S AND SAFECO INSURANCE COMPANY OF AMERICA'S MOTION TO EXCLUDE THE TESTIMONY OF KURT WILLIAMS**, 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

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EXHIBIT 1

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1 **ECWD**
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5 Nevada Bar No. 10567
6 **PEEL BRIMLEY LLP**
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11 rpeel@peelbrimley.com
12 cdomina@peelbrimley.com
13 *Attorneys for Plaintiff*
14 *Helix Electric of Nevada, LLC*

8 **DISTRICT COURT**

9 **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
18 through X; and BOE BONDING
19 COMPANIES I through X,

20 Defendants

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

**PLAINTIFF'S INITIAL LIST OF
WITNESSES AND DOCUMENTS
PURSUANT OT NEV. R. CIV. P. 16.1
DISCLOSURES**

20 Plaintiff, Helix Electric of Nevada, LLC, by and through their attorneys of record,
21 PEEL BRIMLEY LLP and hereby submits its Initial List of Witnesses and Documents
22 pursuant to Nev. R. Civ. P. 16.1 as follows:

23 ///

24 ///

25 ///

1 **A. WITNESSES**

2 1. Robert Johnson
3 Helix Electric of Nevada (Plaintiff)
4 c/o PEEL BRIMLEY LLP
5 3333 E. Serene Ave, Suite 200
6 Henderson, NV 89074
7 Telephone: (702) 990-7272

8 Mr. Johnson is expected to testify regarding his knowledge of the facts and
9 circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
10 2017.

11 2. Victor Fuchs
12 Helix Electric of Nevada (Plaintiff)
13 c/o PEEL BRIMLEY LLP
14 3333 E. Serene Ave, Suite 200
15 Henderson, NV 89074
16 Telephone: (702) 990-7272

17 Mr. Fuchs is expected to testify regarding his knowledge of the facts and
18 circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
19 2017.

20 3. Rainer Prietzel
21 Helix Electric of Nevada (Plaintiff)
22 c/o PEEL BRIMLEY LLP
23 3333 E. Serene Ave, Suite 200
24 Henderson, NV 89074
25 Telephone: (702) 990-7272

26 Mr. Prietzel is expected to testify regarding his knowledge of the facts and
27 circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
28 2017.

29 4. Richard Clement
30 Helix Electric of Nevada (Plaintiff)
31 c/o PEEL BRIMLEY LLP
32 3333 E. Serene Ave, Suite 200
33 Henderson, NV 89074
34 Telephone: (702) 990-7272

1 Mr. Clement is expected to testify regarding his knowledge of the facts and
2 circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
3 2017.

4
5 5. Cody Wright
6 Helix Electric of Nevada (Plaintiff)
7 c/o PEEL BRIMLEY LLP
8 3333 E. Serene Ave, Suite 200
9 Henderson, NV 89074
10 Telephone: (702) 990-7272

11 Mr. Wright is expected to testify regarding his knowledge of the facts and
12 circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
13 2017.

14 6. Omar Diaz
15 Helix Electric of Nevada (Plaintiff)
16 c/o PEEL BRIMLEY LLP
17 3333 E. Serene Ave, Suite 200
18 Henderson, NV 89074
19 Telephone: (702) 990-7272

20 Mr. Diaz is expected to testify regarding his knowledge of the facts and
21 circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
22 2017.

23 7. Charles Wooten, Jr.
24 Helix Electric of Nevada (Plaintiff)
25 c/o PEEL BRIMLEY LLP
26 3333 E. Serene Ave, Suite 200
27 Henderson, NV 89074
28 Telephone: (702) 990-7272

Mr. Wooten is expected to testify regarding his knowledge of the facts and
circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
2017.

8. Mark Smith
Helix Electric of Nevada (Plaintiff)
c/o PEEL BRIMLEY LLP
3333 E. Serene Ave, Suite 200
Henderson, NV 89074

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3333 E. SERENE AVENUE, SUITE. 200
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Telephone: (702) 990-7272

Mr. Smith is expected to testify regarding his knowledge of the facts and circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12, 2017.

9. Kurk Williams
Helix Electric of Nevada (Plaintiff)
c/o PEEL BRIMLEY LLP
3333 E. Serene Ave, Suite 200
Henderson, NV 89074
Telephone: (702) 990-7272

Mr. Williams is expected to testify regarding his knowledge of the facts and circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12, 2017.

10. Juan Barajas
Helix Electric of Nevada (Plaintiff)
c/o PEEL BRIMLEY LLP
3333 E. Serene Ave, Suite 200
Henderson, NV 89074
Telephone: (702) 990-7272

Mr. Barajas is expected to testify regarding his knowledge of the facts and circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12, 2017.

11. Alexander Gelfer
Helix Electric of Nevada (Plaintiff)
c/o PEEL BRIMLEY LLP
3333 E. Serene Ave, Suite 200
Henderson, NV 89074
Telephone: (702) 990-7272

Mr. Gelfer is expected to testify regarding his knowledge of the facts and circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12, 2017.

///

///

///

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1 12. Adine Bagby
2 Helix Electric of Nevada (Plaintiff)
3 c/o PEEL BRIMLEY LLP
4 3333 E. Serene Ave, Suite 200
 Henderson, NV 89074
 Telephone: (702) 990-7272

5 Ms. Bagby is expected to testify regarding his knowledge of the facts and
6 circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
7 2017.

8 13. 30(b)(6) Designee
9 Helix Electric of Nevada (Plaintiff)
10 c/o PEEL BRIMLEY LLP
11 3333 E. Serene Ave, Suite 200
 Henderson, NV 89074
 Telephone: (702) 990-7272

12 The 30(b)(6) Person(s) designated by Helix Electric is expected to testify regarding
13 their knowledge of the facts and circumstances surrounding the allegations set forth in
14 Plaintiff's Complaint filed January 12, 2017.

15 14. 30(b)(6) Designee
16 APCO Construction (Defendant)
17 MARQUIS AURBACH COFFING
18 10001 Park Run Drive
 Las Vegas, NV 89145
 Telephone: (702) 382-0711

19 The 30(b)(6) Person(s) designated by APCO is expected to testify regarding their
20 knowledge of the facts and circumstances surrounding the allegations set forth in Plaintiff's
21 Complaint filed January 12, 2017.

22 15. Joe Pelan
23 APCO Construction (Defendant)
24 MARQUIS AURBACH COFFING
25 10001 Park Run Drive
 Las Vegas, NV 89145
 Telephone: (702) 382-0711

26 ///

27 ///

28

1 Mr. Pelan is expected to testify regarding his knowledge of the facts and
2 circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
3 2017.

4 16. Brian Bohn
5 APCO Construction (Defendant)
6 MARQUIS AURBACH COFFING
7 10001 Park Run Drive
8 Las Vegas, NV 89145
9 Telephone: (702) 382-0711

10 Mr. Bohn is expected to testify regarding his knowledge of the facts and
11 circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
12 2017.

13 17. Randy Nickerl
14 APCO Construction (Defendant)
15 MARQUIS AURBACH COFFING
16 10001 Park Run Drive
17 Las Vegas, NV 89145
18 Telephone: (702) 382-0711

19 Mr. Nickerl is expected to testify regarding his knowledge of the facts and
20 circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
21 2017.

22 18. Jim Barker
23 APCO Construction (Defendant)
24 MARQUIS AURBACH COFFING
25 10001 Park Run Drive
26 Las Vegas, NV 89145
27 Telephone: (702) 382-0711

28 Mr. Barker is expected to testify regarding his knowledge of the facts and
circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
2017.

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1 19. Mark Yoakum
2 APCO Construction (Defendant)
3 MARQUIS AURBACH COFFING
4 10001 Park Run Drive
5 Las Vegas, NV 89145
6 Telephone: (702) 382-0711

7 Mr. Yoakum is expected to testify regarding his knowledge of the facts and
8 circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
9 2017.

10 20. Kim Stevenson
11 APCO Construction (Defendant)
12 MARQUIS AURBACH COFFING
13 10001 Park Run Drive
14 Las Vegas, NV 89145
15 Telephone: (702) 382-0711

16 Kim Stevenson is expected to testify regarding his or her knowledge of the facts and
17 circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
18 2017.

19 21. Mary Jo Allen
20 APCO Construction (Defendant)
21 MARQUIS AURBACH COFFING
22 10001 Park Run Drive
23 Las Vegas, NV 89145
24 Telephone: (702) 382-0711

25 Ms. Allen is expected to testify regarding her knowledge of the facts and
26 circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
27 2017.

28 22. 30(b)(6) Designee
 Safeco Insurance Company of America (Defendant)
 MARQUIS AURBACH COFFING
 10001 Park Run Drive
 Las Vegas, NV 89145
 Telephone: 702) 382-0711

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1 The 30(b)(6) Person(s) designated by Safeco is expected to testify regarding their
2 knowledge of the facts and circumstances surrounding the allegations set forth in Plaintiff's
3 Complaint filed January 12, 2017.

4 23. 30(b)(6) Designee
5 City of North Las Vegas

6 The 30(b)(6) Person(s) designated by the City of North Las Vegas is expected to
7 testify regarding their knowledge of the facts and circumstances surrounding the allegations
8 set forth in Plaintiff's Complaint filed January 12, 2017.

9 24. Joemel Llamado
10 City of North Las Vegas

11 Mr. Llamado is expected to testify regarding their knowledge of the facts and
12 circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
13 2017.

14 25. Jeffrey L. Buchanan
15 City of North Las Vegas

16 Mr. Buchanan is expected to testify regarding their knowledge of the facts and
17 circumstances surrounding the allegations set forth in Plaintiff's Complaint filed January 12,
18 2017.

19 26. Drew Ray
20 Hill International

21 Mr. Ray is expected to testify regarding his knowledge of the facts and circumstances
22 surrounding the allegations set forth in Plaintiff's Complaint filed January 12, 2017.

23 Plaintiff reserves its right to supplement its List of Witnesses pursuant to Nev. R. Civ.
24 P. 16.1 as additional information becomes known throughout discovery. Further, Plaintiff
25 specifically reserves its right at the time of trial to call any and all witnesses identified by any
26 and all parties hereto.

27 A. LIST OF DOCUMENTS

28 Plaintiff produces the following documents Bates Stamped Nos. HEL000001 through
HEL000530.

1 Plaintiff reserves its right to supplement its List of Documents pursuant to Nev. R.
2 Civ. P. 16.1 as additional information becomes known throughout discovery. Further,
3 Plaintiff specifically reserves its right at the time of trial to introduce into evidence any
4 documents produced by any party to this action.

<u>DOCUMENT(S)</u>	<u>BATES NOS.</u>
Project Manager's Costs by Month (September – October)	HEL000001 – HEL000004
Forklift Costs for the Period December 31, 2012 through March 1, 2013	HEL000005 – HEL000009
Helix Monthly Cost Reports Comparison of Actual PM & PE to Kurk W Cost in Claim	HEL000010 – HEL000101
Certified Payroll Report Forms for the Period January through November 2013	HEL000102 – HEL000205
Subcontract with APO Construction signed April 2012	HEL000206 – HEL000223
Helix Electric Bid Proposal dated October 26, 2011	HEL000224 – HEL000225
Nevada State Contractors Board License Search Details printed December 20, 2011	HEL000226 – HEL000227
APCO Construction Daily Time and Material Report for the Craig Ranch Regional Park – Phase II	HEL000228
Certificate of Liability Insurance dated January 18, 2011 marked "Sample"	HEL000229 – HEL000231
Application and Certificate for Payment	HEL000232 – HEL000233
APCO Construction Labor Payment Affidavit (Blank)	HEL000234 – HEL000235
APCO Construction Unconditional Waiver and Release Upon Progress Payment (Blank)	HEL000236

1 APCO Construction Unconditional HEL000237
2 Waiver and Release Upon Final
3 Payment (Blank)

4 APCO Construction Conditional Waiver HEL000238
5 and Release Upon Progress Payment
6 (Blank)

7 APCO Construction Conditional Waiver HEL000239
8 and Release Upon Final Payment
9 (Blank)

10 W-9 for Helix Electric HEL000240

11 Helix Electric Exhibit to the Subcontract HEL000241 – HEL000245
12 dated April 2012

13 Craig Ranch Summary HEL000246

14 Various E-mails HEL000247 – HEL000530

15 Plaintiff also includes any documents in the disclosures of other Parties to this action.

16 Plaintiff specifically reserves the right to supplement this Initial Disclosure to add
17 relevant documents, if subsequent information and investigation so warrants.

18 **B. COMPUTATION OF DAMAGES**

19 Preliminarily, and without waiving its rights to seek such sums am may be provided
20 at time of trial, Plaintiff sees the following sums as damages and as part of its claim against
21 Defendants: \$138,151, exclusive of costs, interest and reasonable attorney's fees. Discovery
22 is ongoing and Plaintiff will update its Damages if and when additional information becomes
23 available.

24 ///

25 ///

26 ///

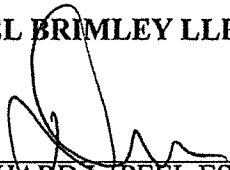
PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, SUITE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

1 C. INSURANCE AGREEMENTS

2 Plaintiff has a commercial general liability policy which is not in dispute in the Case.
3 Plaintiff reserves its right to supplement this portion of its Nev. R. Civ. P. 16.1 Disclosure as
4 additional information becomes known throughout discovery.

5 Dated this 2 day of October, 2017.

6 **PEEL BRIMLEY LLP**

7 
8
9 RICHARD L. PEEL ESQ.
10 Nevada Bar No. 4359
11 CARY B. DOMINA, ESQ.
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18 *Attorneys for Plaintiff*
19 *Helix Electric of Nevada, LLC*
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28

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY, LLP, and that on this 2nd day of October, 2017, I caused the above and foregoing document, **PLAINTIFF'S INITIAL LIST OF WITNESSES AND DOCUMENTS PURSUANT OT NEV. R. CIV. P. 16.1 DISCLOSURES**, to be served as follows:

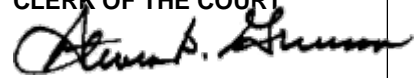
- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☒ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent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

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

E-Service Master List For Case		
Helix Electric of Nevada LLC, Plaintiff(s) vs. APCO Construction, Defendant(s)		
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*Attorneys for APCO Construction, Inc.
and Safeco Insurance Company of America*

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiff,

v.

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

Defendants.

Case No.: A-16-730091-B
Dept. No.: XI

APCO CONSTRUCTION, INC. AND
SAFECO INSURANCE COMPANY OF
AMERICA'S PRE-TRIAL BENCH
MEMORANDUM

APCO Construction, Inc. ("APCO") and Safeco Insurance Company of America ("Safeco") (collectively referred to as "Defendants"), by and through their attorneys, Fennemore Craig, P.C., hereby provide the Court with this Pre-Trial Bench Memorandum to clarify and assist the Court in relation to certain issues of law that control this case and dispute. Specifically, this Memorandum addresses the legal effect of the Subcontract's payment provisions and conditions, Helix Electric of Nevada, LLC's ("Helix") failure to support its claim with actual costs that are

1 causally related to the delay, and the final “Release and Waiver” signed by Plaintiff, which
2 entirely disposes of and prohibits its claims.

3 MEMORANDUM OF POINTS AND AUTHORITIES

4 This matter arises from the construction of the public works project known as Craig Ranch
5 Regional Park Phase II (“Project”). APCO was the general contractor and Helix was the electrical
6 subcontractor. Helix claims certain unsupported damages allegedly caused by City delays on the
7 Project. Based upon the facts that will be established at trial, Helix’s claims are barred for three
8 separate reasons: (1) Helix’s failure to satisfy the Subcontract’s payment conditions; (2) Helix’s
9 failure to support its claim with actual costs; and (3) the final and complete “Release and Waiver”
10 signed by Helix.

11 I. The Damages Sought by Helix are Precluded under the Subcontract.

12 A. *The Subcontract, as amended by the Helix Addendum, Precludes Monetary* 13 *Damages for Delays Caused by Anyone or Anything other than APCO.*

14 Section 6.5 of the parties’ Subcontract limits Helix’s rights in the event of delays:

15 If Subcontractor shall be delayed in the performance of the Work by any act or
16 neglect of the Owner or Architect, or by agents or representatives of either, or by
17 changes ordered in the Work, or by fire, unavoidable casualties, national
18 emergency, or by any cause other than [SIC] the intentional Interference of
19 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.

20 [See JX011 at APCO000444]. The parties did not delete this paragraph in the Helix Addendum.

21 With its Addendum, Helix added additional language to Section 6 specifying that Helix
22 would be entitled to damages for delays only if the City paid APCO:

23 In the event the schedule as set forth above is changed by Contractor for whatever
24 reason so that Subcontractor either is precluded from performing the work in
25 accordance with said schedule and thereby suffers delay, or, is not allowed the
26 number of calendar days to perform the work under such modified schedule and
27 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.

28 [See JX011 at APCO000474]. These provisions address separate causes of delay and should be

1 interpreted consistently with the other Subcontract provisions.

2 Contractual provisions should be harmonized whenever possible and construed to reach a
3 reasonable solution. *Royal Indem. Co. v. Special Serv.*, 82 Nev. 148, 151, 413 P.2d 500, 502
4 (1966); *Eversole v. Sunrise Villas VIII Homeowners Ass’n*, 112 Nev. 1255, 1260, 925 P.2d 505,
5 509 (1996) (citing *Fisher Properties v. Arden–Mayfair, Inc.*, 106 Wash.2d 826, 726 P.2d 8, 15
6 (1986)). Had the language added by Helix in the Helix Addendum been intended to render
7 meaningless the original language in Section 6.5 the parties would have indicated that the original
8 language of Section 6.5 was to be deleted, as was done in other modifications contained in the
9 Helix Addendum. [See JX011 at APCO000474 (“[t]he following terms will be added to or replace
10 portions of the paragraphs in the Subcontract.”); *id.* (“Section 4, Paragraph 4.2: Revise to read as
11 follows.”); *id.* (“Section 4, Paragraph 4.6: Revise as follows: Third line delete ... [a]nd replace
12 with....”) *cf. id.* (Section 6 “Add the following”)]. Having not so indicated, it is clear that the
13 language in Section 6.5 was not intended to be deleted or otherwise modified by this general
14 “addition” to Section 6. Because Section 6.5 was left intact, the Court should interpret the
15 Subcontract to give effect to every word and harmonize any perceived inconsistency.

16 By its plain terms, Section 6.5 and the Helix addition to Section 6 contained in the Helix
17 Addendum discuss events that allow Helix to recover costs for delays and events that only allow
18 Helix to obtain an extension of time. Specifically, the events that provide the sole remedy of an
19 extension of time are delays caused by anyone or anything other than intentional interference by
20 APCO. [JX011 at Section 6.5 (“any act or neglect of *the Owner* or Architect, or by agents or
21 representatives of either, or by changes ordered in the Work, or by fire, unavoidable casualties,
22 national emergency, or by any cause other than [SIC] the intentional Interference of Contractor”
23 (emphasis added))]. Whereas, the events that allow Helix to recover costs are changes in the
24 schedule initiated by APCO itself. [JX011 at APCO000474 (“**Section 6: Add the following:** ‘In
25 the even the schedule as set forth above is change by Contractor for whatever reason so that
26 Subcontractor either is precluded from performing the work in accordance with the schedule and
27 thereby suffers delay, or, is not allowed the number of calendar days to perform the work under
28 such modified schedule and must accelerate its performance, then Subcontractor shall be

1 entitled to receive from Contractor payment representing the costs and damages sustained by
2 Subcontractor for such delay or acceleration providing said costs and damages are first paid to
3 Contractor.” (emphasis in original)].

4 This is the only construction that gives effect to every word in the Subcontract and
5 harmonizes the language to reach a reasonable resolution. Any other reading would render the
6 unmodified language of Section 6.5 and other provisions meaningless. For example, Section 6.7
7 states:

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

11 (emphasis added). This section was not deleted or modified by the Helix Addendum.

12 It is a cardinal rule of contract interpretation that a more specific provision controls over a
13 general provision if they are in conflict; *i.e.*, the more specific provision is construed as an
14 exception to the general provision. RESTATEMENT OF THE LAW (CONTRACTS), § 236(C). Under
15 such an interpretation, the language added by Helix would be general as applying to every
16 instance of delay, whereas the language of Section 6.5 would be specific as applying to delay
17 caused by “any act or neglect of the Owner or Architect, or by agents or representatives of either,
18 or by changes ordered in the Work, or by fire, unavoidable casualties, national emergency, or by
19 any cause other than [SIC] the intentional Interference of Contractor”. As such, Section 6.5 would
20 control in relation to delay caused by any act or neglect by the City and would preclude Helix
21 from recovering a monetary judgment.

22 Finally, this interpretation is similarly supported by the fact that a plaintiff should only be
23 entitled to recover damages actually caused by the defendant; a concept consistently applied to
24 claims for delay damages in the construction context. *See e.g., Structural Sales, Inc. v. Vavrus*,
25 132 Ill. App. 3d 718, 721, 477 N.E.2d 745, 748 (1985) (“The party claiming damages for delay
26 must prove that the delay was the fault of the party against whom the damages are sought.”);
27 *Phoenix Elec. Contracting, Inc. v. Lehr Const. Corp.*, 219 A.D.2d 467, 467–68, 631 N.Y.S.2d 146,
28 147 (1995) (“[A]bsent a contractual commitment to the contrary, a prime contractor is not

1 responsible for delays that its subcontractor may incur unless those delays are caused by some
2 agency or circumstance under the prime contractor's direction or control".) (quoting *Triangle*
3 *Sheet Metal Works v. Merritt & Co.*, 79 N.Y.2d 801, 802, 580 N.Y.S.2d 171, 588 N.E.2d 69
4 (1991).

5 Because the parties have stipulated that the delays were not caused by APCO in the Pretrial
6 Statement, it is clear that, per the terms of the Subcontract, as modified by the Helix Addendum,
7 no damages are awardable to Helix.

8 *B. The No Delay Damages Clause is Enforceable.*

9 Generally speaking, provisions providing for the exclusion of delay damages are
10 enforceable. *See e.g., J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 285
11 (Nev. 2004) (holding that a contractual "no damages for delay" provision in a construction
12 contract is valid and enforceable). Under Nevada law, such a provision is unenforceable in only
13 three instances: (1) delays caused by fraud, misrepresentation, concealment or other bad faith; (2)
14 delays so unreasonable in length as to amount to project abandonment; and (3) delays caused by
15 the other party's active interference. *Id.* at 286, 288. These exceptions "aid in enforcing the
16 implied covenant of good faith and fair dealing [that] exists in every Nevada contract and
17 essentially forbids arbitrary, unfair acts by one party that disadvantage[s] the other." *Id.* at 286.
18 Effectively, these exceptions are meant to exclude from such disclaimers delays caused by one of
19 the parties. *Id.* Given the fact that the delays were not caused by APCO, it is clear that the
20 provision is enforceable and precludes Helix from being awarded any damages for any alleged
21 delay.

22 **II. Helix has Not Met its Burden of Proof to Establish any Awardable Damages in**
23 **any Instance.**

24 *A. To the Extent the Court finds that the Subcontract Requires the Payment of Delay*
25 *Damages, a Condition Precedent to Such Payment is Payment by the Owner which*
26 *Helix has Failed to Prove.*

27 Under controlling law and the terms of the Subcontract, Helix has failed to meet its burden
28 of proof on recoverable costs. The Subcontract provides that prior to any payment becoming due
to Helix, APCO would first have to receive a similar payment from the City. Specifically, Section

1 4.8 of the Subcontract—which was not modified by the Helix Addendum—provides:

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

4 Similarly, Section 7.2, as modified by the Helix Addendum provides:

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

9 Finally, even the language added to Section 6 by Helix’s Addendum contains the same condition:

10 ...then Subcontractor shall be entitled to receive from Contractor payment
11 representing the costs and damages sustained by Subcontractor for such delay or
acceleration, providing said costs and damages are first paid to Contractor.

12 “[A]bsent some countervailing reason, contracts will be construed from the written
13 language and enforced as written”. *Ellison v. C.S.A.A.*, 106 Nev. 601, 603, 797 P.2d 975, 977
14 (1990). There is simply no countervailing reason to not apply this condition as written. “Any
15 ambiguity, moreover, should be construed against the drafter.” *Anvui, LLC v. G.L. Dragon, LLC*,
16 123 Nev. 212, 215-26 (2007). Helix prepared the Addendum. In addition, even if this condition
17 could be construed as being unlikely to occur, this does not invalidate it as not only was it
18 bargained for, Helix itself reinforced it through its own Addendum. For comparison, impossibility
19 or impracticability are only a defense to unforeseen conditions, not conditions explicitly added to a
20 contract itself. *See Nebaco, Inc. v. Riverview Realty Co.*, 87 Nev. 55, 57, 482 P.2d 305, 307
21 (1971). Given the fact that Helix placed this condition on itself in its Addendum there is no
22 question that the Court must enforce it.

23 Helix cannot prove that its claimed costs have already been paid to APCO by the City. So
24 this condition has not been satisfied and Helix’s claims are barred.

25 *B. The Subcontract and Common Law Require Proof of Actual Damages which*
26 *Plaintiffs have Failed to Produce and will Fail to Establish.*

27 “The party seeking damages has the burden of proving both the fact of damages and the
28 amount thereof.” *Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co., Inc.*, 105 Nev.

1 855, 856-57 (Nev. 1989). Here, the Subcontract requires proof of actual costs:

2 Contractor may order or direct changes, additions, deletions or other revisions in
3 the Subcontract work without invalidating the Subcontract. No changes,
4 additions, deletions, or other revisions to the Subcontract shall be valid unless
5 made in writing. Subcontractor mark up shall be limited to that stated in the
6 contract documents in addition to *the direct/actual on-site cost* of the work,
7 however, no profit and overhead markup on overtime shall be allowed.

8 [JX011 at Section 7.1¹ (emphasis added)].

9 Similarly, proof of actual costs for delay damages is required as a matter of law. Indeed,
10 courts have uniformly held that if evidence of an exact calculation is reasonably possible it must
11 be presented and made available to the trier of fact. *See e.g., Martin v. Trinity Hosp.*, 2008 ND
12 176, ¶ 31, 755 N.W.2d 900, 910 (“The import of the holding in those cases is that a plaintiff may
13 offer inexact evidence on the amount of damages in a breach of contract action **only** if there is no
14 definite evidence available for an exact determination of the damages resulting from the breach.”).
15 A “subcontractor’s damages for delay in construction cases are measured as a general matter by
16 ‘the extent to which **its costs were increased** by the improper conduct, and its recovery will be
17 limited to the damages actually sustained.’” *Thalle Constr. Co. v. The Whiting–Turner*
18 *Contracting Co.*, 39 F.3d 412, 417 (2d Cir.1994) (quoting *Peter Scalamandre & Sons, Inc. v.*
19 *Village Dock, Inc.*, 187 A.D.2d 496, 589 N.Y.S.2d 191 (2d Dep’t 1992)); *see also Clifford R. Gray*
20 *Inc. v. State*, 251 A.D.2d 728, 729, 674 N.Y.S.2d 440, 442 (1998) (“It is well settled that in
21 calculating contract damages due to delays ‘[a] contractor wrongfully delayed by its employer
22 **must establish the extent to which its costs were increased** by the improper acts because its
23 recovery will be limited to damages actually sustained’” (quoting *Berley Indus. v. City of New*
24 *York*, 45 N.Y.2d 683, 687, 412 N.Y.S.2d 589, 385 N.E.2d 281); *see also, J & K Plumbing &*
25 *Heating Co. v. State of New York*, 235 A.D.2d 751, 752, 652 N.Y.S.2d 369).

26 For example, in *Nat’l Door & Hardware Installers, Inc. v. Mirsaidi*, the Tennessee Court
27 of Appeals upheld a ruling that despite delays on a project being caused through no fault of the
28 subcontractor, its proof of damages was insufficient. No. M2013-00386-COA-R3CV, 2014 WL

¹ This Section was unmodified by the Helix Addendum.

1 3002007, at *9 (Tenn. Ct. App. June 30, 2014). Specifically, the plaintiff in *Mirsaidi* “entered into
2 evidence a ‘Summary of Extended Overhead’ through its expert witness, Mr. Page. This exhibit
3 outlined several categories of extended overhead and their weekly rates. Mr. Page testified that he
4 based his calculations on conversations with Plaintiff’s employees, prominently Mr. Alford, and
5 also used numbers from actual bills to create a reasonable estimate of damages, but he did not
6 calculate the actual out-of-pocket costs over the nine-month delay period.” The court concluded
7 that no damages for equipment were established given the fact that “there was no proof that the
8 equipment was purchased primarily for use on this job or that its cost was being allocated entirely
9 to this job.” *Id.* at 10 (internal citation and quotations omitted). The trial court and the court of
10 appeals confirmed that this was not competent proof as it failed to provide actual costs or allocate
11 specific costs to the project in dispute. *Id.* at 9 – 10; *See also Moore Constr. Co., Inc. v.*
12 *Clarksville Dep’t of Elec.*, 707 S.W.2d 1 (Tenn.Ct.App.1985) (“The additional salaries of
13 [contractor’s] foreman and project superintendent were taken from the company’s weekly costs
14 records and **represent the actual amount of time they were on the job.** However, the salaries of
15 the other two employees were determined based upon a factor relating to the balance of the unpaid
16 amount of this contract when compared to the total amount of other business the company had at
17 the time. While the proof of the additional salary [the contractor] was required to pay its foreman
18 and project superintendent is competent and provides an adequate basis upon which to award
19 damages, the manner in which the additional payroll costs for the other four employees was
20 determined is not.”). Moreover, “[i]t is incumbent on a contractor not only to quantify the
21 damages but also **to connect the alleged losses to the particular incident of delay.**” *A.G. Cullen*
22 *Const., Inc. v. State Sys. of Higher Educ.*, 898 A.2d 1145, 1160–61 (Pa. Commw. Ct. 2006)
23 (emphasis added), *disapproved on other grounds by A. Scott Enterprises, Inc. v. City of Allentown*,
24 636 Pa. 249, 142 A.3d 779 (2016).

25 As will be shown, Helix admits that precise calculations of its alleged losses were and are
26 possible. Despite this, Helix has ignored its actual costs and is presenting its claim on estimated
27 rates for a project manager and superintendent that were not involved during the extended
28 performance. And Helix discarded the equipment lists that would show actual costs.

1 See DX213. Based upon the Subcontract, which requires proof of “actual” costs and the law
2 which mandates the same, Helix’s failure to provide this required proof is fatal to any legal claim
3 that may exist. See e.g., *Lichter v. Mellon Stuart Co.*, 305 F.2d 216, 219–20 (3d Cir. 1962) (In
4 relation to a delay claim the court held that “[i]n these circumstances Southern’s inability to break
5 down its lump sum proof of extra costs justifies the denial of any recovery”).

6 **III. Helix has Waived and Released its Claims.**

7 On October 18, 2013, the Senior Vice President of Helix, Robert D Johnson, signed a
8 “Conditional Waiver and Release Upon Final Payment” (the “Release”). In pertinent part, the
9 Release provided that

10 [u]pon receipt by the undersigned of a check in the above referenced Payment
11 Amount payable to the undersigned, and when the check has been properly
12 endorsed and has been paid by the bank on which it is drawn, this document
becomes effective to release [all claims with the exception of Disputed Claims
referenced in the Release]....

13 The Release further indicated next to the “Amount of Disputed Claims” “Zero”. As such, by its
14 plain terms the Release covered all claims arising out of the Project.

15 It is black letter law that “absent some countervailing reason, contracts will be construed
16 from the written language and enforced as written.” *Nevada Yellow Cab Corp. v. Eighth Judicial*
17 *Dist. Court ex rel. Cty. of Clark*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007) (internal citations
18 omitted). Here, by its plain terms, the Release becomes effective if two (2) conditions are met: (1)
19 Helix’s receipt of a check in the amount indicated and (2) proper endorsement of the check by
20 Helix and transfer of the funds by the bank².

21 After the City released final retention, APCO tendered the final payment by check in the
22 amount indicated in the Release and Helix negotiated and received payment on the check. When
23 Helix sent an email about the final payment, APCO responded and suggested that Helix propose
24 mutually acceptable language. Rather than doing so, Helix cashed the check. The next day, Helix

25
26 ² The utilization of commas, or to be more accurate the lack of a comma after the word “endorsed”
27 and prior to the word “and”, indicates that proper endorsement and transfer of funds are
28 considered a single condition. [Release (“Upon receipt by the undersigned of a check in the above
referenced Payment Amount payable to the undersigned, and when the check has been *properly*
endorsed and has been paid by the bank on which it is drawn, this document becomes effective to
release” (emphasis added))

1 delivered a new signed release with reservation language that was not acceptable to APCO. So by
2 cashing the check without rescinding the Release or the parties agreeing upon reservation
3 language, Helix clearly released its present claim.

4 The Release contains no clause stating that Helix could, on a whim, unilaterally back out
5 of the legally binding agreement by simply saying as much. Indeed, “[n]o principle is better
6 settled than that a party cannot rescind a contract and at the same time retain possession of the
7 consideration, in whole or in part, which he has received under it. He must rescind *in toto*, or not at
8 all.” *Bishop v. Stewart*, 13 Nev. 25, 41 (1878). The simple fact that Helix cashed the check
9 forecloses its subsequent attempt to rescind the Release. *Bergstrom v. Estate of DeVoe*, 109 Nev.
10 575, 577, 854 P.2d 860, 861 (1993) (“When a contract has been partially performed, and one of the
11 parties to it makes default, the other has a choice of remedies. He may and he must rescind or
12 affirm the contract, *but he cannot do both*. If he would rescind it, he must immediately return
13 whatever of value he has received under it, and then he may defend against an action for specific
14 performance ... and he may recover back whatever he has paid.... ***He cannot at the same time***
15 ***affirm the contract by retaining its benefits and rescind it by repudiating its burdens.***” (emphasis
16 added)).

17 As a matter of fundamental contract law, even if Helix’s email could be construed as
18 somehow preventing a condition of the Release from being fulfilled, which it did not, Helix could
19 not act to prevent a condition from occurring and then utilize its failure to claim the Release was
20 invalid or unenforceable. “[A]n individual who voluntarily prevents the occurrence of a condition
21 established for his or her benefit is estopped from seeking relief from a contract on the grounds
22 that the condition precedent to his obligation failed to occur.” *NGA #2 Liab. Co. v. Rains*, 113
23 Nev. 1151, 1161, 946 P.2d 163, 169 (1997) (quoting *Broussard v. Hill*, 100 Nev. 325, 330, 682
24 P.2d 1376, 1379 (1984)). Put another way, even if Helix’s actions somehow prevented a condition
25 of the Release from being fulfilled (which they did not), no action on the part of Helix would
26 legally allow Helix to ignore the Release or otherwise nullify its effect. It is black letter law that a
27 party who has prevented performance may not take advantage of such prevention. “‘It is a
28 principle of fundamental justice that if a promisor is himself the cause of the failure of

1 performance, either of an obligation due him or of a condition upon which his own liability
2 depends, he cannot take advantage of the failure.” *Cladianos v. Friedhoff*, 69 Nev. 41, 46, 240
3 P.2d 208, 210 (1952); *see also* 9 Am.Jur. 74 (Building and Construction Contracts, § 117.);
4 *Cladianos*, 69 Nev. at 48–49, 240 P.2d at 211 (“In cases such as the one before us, where it is the
5 other party to the contract who is guilty of the breach *or of prevention of performance*, the
6 complaining party is not limited to quantum meruit. True, he may *elect* to recover in quantum
7 meruit (as certain of appellant’s authorities indicate) *but may also elect to stand upon the*
8 *contract.*) (emphasis added).

9 Helix’s protest regarding the tendered check could not act to modify or invalidate the
10 Release as a matter of law. Helix was required to formally rescind its previously executed release
11 and not cash the check if it was truly intending to retain its claim, which was not noted on the
12 Release. Critically, the evidence will show that Helix signed the Release after being informed that
13 the City had denied its claim. As such, the Court must conclude that the Release is fully
14 enforceable and acts as a complete bar to Helix’s claims.

15 CONCLUSION

16 As set forth above, Helix’s claims must fail based upon the Subcontract, Helix’s failure to
17 meet its burden of proof, and the Release.

18 RESPECTFULLY SUBMITTED this 31st day of May, 2019.

19
20 **FENNEMORE CRAIG, P.C.**

21 By: /s/ Brandi M. Planet

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

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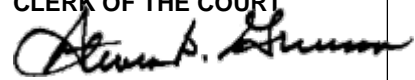
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Fennemore Craig, P.C., and further certify that the: **APCO CONSTRUCTION, INC. AND SAFECO INSURANCE COMPANY OF AMERICA’S PRE-TRIAL BENCH MEMORANDUM** was served by electronically filing via Odyssey File & Serve e-filing system and serving all parties with an email address on record, pursuant to the Administrative Order 14-2 and Rule 9 N.E.F.C.

DATED: May 31, 2019.

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



1 **MEM**

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13 *Attorneys for APCO Construction, Inc.*

14 *and Safeco Insurance Company of America*

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

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

19 Plaintiff,

20 v.

21 APCO CONSTRUCTION, a Nevada
22 corporation; SAFECO INSURANCE
23 COMPANY OF AMERICA; DOES I through
24 X; and BOE BONDING COMPANIES, I
25 through
26 X, Defendants.

Case No.: A-16-730091-C

Dept. No.: XVII

APCO CONSTRUCTION, INC.'S TRIAL
MEMORANDUM PURSUANT TO EDCR
7.27 RE: POTENTIAL EVIDENTIARY
ISSUES

27 COMES NOW, APCO Construction, Inc. ("APCO"), by and through its attorneys,
28 Fennemore Craig, P.C., and respectfully submits this Trial Memorandum pursuant to EDCR 7.27.

29 **I. INTRODUCTION AND BRIEF STATEMENT OF FACTS**

30 This matter arises from the construction of public works project Craig Ranch Regional
31 Park Phase II ("Project"). APCO was the general contractor and Helix Electric of Nevada, LLC
32 ("Helix") was the electrical subcontractor. The Project encountered multiple delays due to
33 differing site conditions. Helix now seeks to recover \$138,151.00 in additional costs for extended
34 general conditions. APCO disputes that Helix can recover these additional costs.

1 In support of these claims, APCO anticipates that Helix will rely upon its voluminous job
2 cost reports and certified payroll records. APCO prepared a summary of the data contained in
3 these records, as well as APCO's own sign-in sheets for the project, and seeks to have the
4 summary admitted into evidence at the time of trial. Helix asserts that the summaries can only be
5 used as demonstrative exhibits. This position is inconsistent with Nevada law. APCO also
6 anticipates that Helix will attempt to introduce evidence of settlement discussions, including a
7 promissory note Helix tried to convince APCO to sign and emails regarding payment terms. Such
8 evidence should be excluded.

9 Lastly, one of the key issues in this case is the contractual language Helix added to the
10 subcontract relating to the pay-if-paid clause and related terms. APCO seeks to have its
11 representative Joe Phelan testify about the negotiations that led to the inclusion of these
12 supplemental terms in the subcontract. For the reasons below, this testimony should be permitted.

13 II. POINTS AND AUTHORITIES

14 EDCR 7.27 states:

15 Unless otherwise ordered by the court, an attorney may elect to submit to the
16 court in any civil case, a trial memoranda of points and authorities at any time
17 prior to the close of trial. The original trial memoranda of points and authorities
18 must be filed and a copy of the memoranda must be served upon opposing
counsel at the time of or before submission of the memoranda to the court.

19 A. Summaries of voluminous data are admissible.

20 NRS 52.275 states in pertinent part that "[t]he contents of voluminous writings,
21 recordings or photographs which cannot conveniently be examined in court may be presented in
22 the form of a chart, summary or calculation." The original documents need only be made
23 available for examination or copying to other parties or be produced by order of the court. There
24 are no further caveats under Nevada law regarding the use of summaries—they are not relegated
25 only to demonstrative exhibits.

26 During trial, APCO seeks to utilize and rely upon summaries APCO prepared of Helix's
27 voluminous job cost reports and certified payroll records and two years' of APCO sign-in sheets.
28 The use of such summaries is permitted by Nevada law. In *Pandelis Const. Co., Inc. v. Jones-*

1 *Viking Associates*, 103 Nev. 129, 734 P.2d 1236 (1987), the Nevada Supreme Court balked when
2 the appellant took the position that the admitted summaries were not actual evidence, despite the
3 lower court having admitted the same, stating they were “at a loss to explain how *something*
4 *properly admitted* under a rule of evidence could not be evidence.” *Id.* at 131, 1237 (emphasis
5 added). In support of this position, the Nevada Supreme Court cited to NRS 52.275, noting the
6 use of summaries is permitted for “voluminous writings”. *Id.*; *see also* NRS 52.275. The Nevada
7 Supreme Court offered no criticism of the lower court for properly admitting the summaries.

8 APCO requests that this Court permit APCO to rely upon and submit summaries of
9 Helix’s job cost reports and certified payroll records and the APCO sign-in sheets into evidence.
10 The summaries will assist APCO and the Court in analyzing the voluminous data. More
11 importantly, as owner and custodian of these documents, Helix has had possession of these
12 documents since their creation so Helix will not suffer any prejudice. APCO also produced the
13 sign-in sheets during discovery. These documents are currently marked as exhibits, but there is no
14 reasonable way for the witnesses or Court to efficiently process the information during trial
15 without the summaries.

16 **B. Evidence of settlement discussions are properly excluded.**

17 APCO anticipates that Helix will attempt to submit into evidence emails, a promissory
18 note and other documents related to settlement discussions prior to litigation as well as question
19 witnesses about the settlement discussions. Such actions should not be permitted. Offers of
20 compromise are admissible only when offered for a purpose other than proving liability. NRS
21 48.105 states:

22 1. Evidence of:

23 (a) Furnishing or offering or promising to furnish; or

24 (b) Accepting or offering or promising to accept,

25 ➔ a valuable consideration in compromising or attempting to compromise a claim
26 which was disputed as to either validity or amount, is not admissible to prove
27 liability for or invalidity of the claim or its amount. Evidence of conduct or
28 statements made in compromise negotiations is likewise not admissible.

2. This section does not require exclusion when the evidence is offered for
another purpose, such as proving bias or prejudice of a witness, negating a
contention of undue delay, or proving an effort to obstruct a criminal investigation
or prosecution.

1 In this case, Helix has no reason to offer evidence or testimony relating to settlement
2 discussions other than for an impermissible purpose, such as proving liability. Such evidence and
3 testimony is therefore properly excluded. In *Dannenbring v. Wynn Las Vegas, LLC*, 907
4 F.Supp.2d 1214 (D. Nev. 2013)¹, the court permitted evidence of settlement negotiations because
5 they were used to demonstrate a retaliatory motive. In *Kraus v. Lennar Reno, LLC*, 2018 WL
6 4088008 (D. Nev. August 27, 2018), a settlement demand was utilized to show that the amount in
7 controversy exceeded \$75,000.00. Lastly, in *Holland Livestock Ranch v. U.S.*, 588 F.Supp. 943
8 (D. Nev. 1984), the court did not permit the use of evidence that plaintiff paid a monetary penalty
9 for willful trespass to show that there was in fact a willful trespass.

10 For similar reasons, Helix should be precluded from entering settlement discussions and
11 related documents into evidence. The only purpose Helix has to use this evidence is to attempt to
12 prove liability, which is improper under Nevada law. There have been no allegations of retaliation
13 nor is there any reason to use the settlement discussions to prove some procedural issue, such as
14 an amount in controversy. This evidence is therefore properly excluded.

15 **C. The Parol Evidence Rule does not preclude testimony related to certain contract**
16 **negotiations.**

17 “The parol evidence rule does not permit the admission of evidence that would change the
18 contract terms when the terms of a written agreement are clear, definite, and unambiguous.
19 However, parol evidence *is admissible* to prove a separate oral agreement regarding any matter
20 not included in the contract or *to clarify ambiguous terms* so long as the evidence does not
21 contradict the terms of the written agreement.” *Ringle v. Bruton*, 120 Nev. 82, 91, 86 P.3d 1032,
22 1037 (2004)(emphasis added); *Crow–Spieker # 23 v. Robinson*, 97 Nev. 302, 305, 629 P.2d 1198,
23 1199 (1981) (holding that parol evidence, so long as it is not inconsistent with the terms of the
24 written contract, may be admitted to prove the existence of a separate oral agreement as to matters
25 on which the written contract is silent); *State ex rel. List v. Courtesy Motors*, 95 Nev. 103, 107,
26

27 ¹ In interpreting the NRCP, federal cases interpreting the FRCP are “strong persuasive authority” because the NRCP
28 are largely based on their federal counterparts. *See Executive Management, Ltd. v. Ticor Title Ins. Co.*, 118 Nev.
46,53, 38 P.3d 872, 876 (2002). The same logic should apply when interpreting Nevada versus federal rules of
evidence given the similarities between FRE 408 and NRS 48.105.

1 590 P.2d 163, 165 (1979) (stating that parol evidence is admissible to determine intent when the
2 written contract is ambiguous).

3 One of the key issues in this case is the meaning and intent behind certain contract
4 provisions, specifically those added into the contract by Helix relating to delay claims as well as
5 the remedies available to Helix under the contract. Because APCO and Helix disagree as to the
6 meaning behind supplemental conditions added to the contract, parol evidence, specifically in the
7 form of testimony by an APCO representative, should be permitted to resolve any contract
8 ambiguities that may be identified by the Court. *See Lowden Inv. Co. v. Gen. Elec. Credit Co.*,
9 103 Nev. 374, 741 P.2d 806 (1987)(parol evidence was properly admitted in order to interpret the
10 terms in a purchase agreement).

11 **III. CONCLUSION**

12 Summaries of voluminous data are a useful tool to synthesize and assist with the
13 explanation of that data. There is nothing in Nevada law that precludes these summaries from
14 being entered into evidence or that relegates their use to demonstrative exhibits.

15 Documents and testimony related to settlement negotiations or discussions should not be
16 admitted. There is no reason for this evidence to be admitted into evidence other than in an
17 attempt for Helix to prove APCO's alleged liability—this is not a permitted use of such evidence.
18 It is therefore not properly admitted.

19 Lastly, parol evidence regarding contract negotiations should be permitted in order to
20 interpret or otherwise clarify any contract terms that the Court may find ambiguous.

21 DATED this May 31, 2019.

22 **FENNEMORE CRAIG, P.C.**

23
24 By: /s/ Brandi M. Planet

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

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

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

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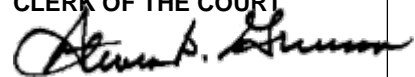
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Fennemore Craig, P.C., and further certify that the: **APCO CONSTRUCTION, INC.’S TRIAL MEMORANDUM PURSUANT TO EDCR 7.27 RE: POTENTIAL EVIDENTIARY ISSUES** was served by electronically filing via Odyssey File & Serve e-filing system and serving all parties with an email address on record, pursuant to the Administrative Order 14-2 and Rule 9 N.E.F.C.

DATED: May 31, 2019.

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



1 **FFCL**

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8 *Attorneys for APCO Construction, Inc.*

and Safeco Insurance Company of America

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

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

14 Plaintiff,

15 v.

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

Case No.: A-16-730091-C

Dept. No.: XVII

**APCO CONSTRUCTION, INC.'S AND
SAFECO INSURANCE COMPANY OF
AMERICA'S PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW**

21 Pursuant to Nevada Rule of Civil Procedure 52 and the Procedures for Civil Bench Trials,
22 District Court, Department 11, APCO Construction, Inc. ("APCO") and Safeco Insurance
23 Company of America ("Safeco") (collectively referred to as "Defendants"), by and through their
24 attorneys, Fennemore Craig, P.C., hereby submit their Proposed Findings of Fact and Conclusions
25 of Law.

26 ///

27 ///

1 **I. FINDINGS OF FACTS**

2 **A. The Project**

3 1. On or about July 13, 2011, APCO submitted a bid for the Craig Ranch Regional
4 Park – Phase II - Project No. 10294 (“Project”) to the City of North Las Vegas (the “City”). At
5 that time, the anticipated Project duration was approximately 550 calendar days.

6 2. Helix Electric, Inc. (“Helix”) submitted a subcontract bid of approximately
7 \$4,600,000 to APCO for the electrical work required on the Project. Helix’s estimate assumed a
8 Project duration of 550 days.

9 3. The City canceled the original solicitation and ultimately requested a second round
10 of bids on or about October 26, 2011. Among other things, the City changed the duration of the
11 Project from 18 months down to 12 months.

12 4. On or about October 26, 2011, APCO submitted its second bid to the City for the
13 Project.

14 5. Shortly before that bid submission, Helix submitted its second proposal to APCO
15 for the Project in the amount of \$4,628,025.00. *See* JX011 p. 457, attachment to the Subcontract.
16 At the time of bid both APCO and Helix anticipated that the Project would take longer than 12
17 months.

18 6. The City awarded APCO the prime contract for the Project on or about December
19 7, 2011 (the “Contract”).

20 7. After receiving the notice of proposed award, APCO negotiated subcontract terms
21 with Helix. As part of that process, APCO agreed to purchase certain materials totaling
22 \$2,248,248.00 (per client). *See* JX010, which was to be removed from Helix’s scope and pricing.
23 So the Subcontract price was \$2,380,085.20.

24 8. During that process, Helix requested numerous changes to APCO’s standard
25 subcontract. Helix’s price essentially included the 550-day schedule initially bid. As a result,
26 APCO and Helix agreed to a supplemental clause amending Section 6 to condition Helix’s right to
27 any delay costs would arise if and only if the City paid APCO for those costs.
28

1 9. On or about April 19, 2012, APCO and Helix entered into a formal subcontract for
2 the electrical work required on the Project (the “Subcontract”). The Helix requested changes are
3 reflected in the addendum to the Subcontract. *See* JX011 (pp. 474–478).

4 10. The Subcontract contained several critical provisions that are relevant to Helix’s
5 delay claim for extended Project overheads. More specifically, Section 4.8 of the Subcontract
6 provided that “Subcontractor agrees that Contractor shall have no obligation to pay Subcontractor
7 for any changed or extra work performed by Subcontractor until or unless Contractor has actually
8 been paid for such work by the Owner.” Section 4.8 was not modified by the Helix Addendum.

9 11. Section 6.5 contains a no damage for delay provision that states as follows:

10 “If Subcontractor shall be delayed in the performance of the Work by any
11 act or neglect of the Owner or Architect, or by agents or representatives of
12 either, or by changes ordered in the Work, or by fire, unavoidable
13 casualties, national emergency, or by any cause other than [SIC] the
14 intentional Interference of Contractor, Subcontractor shall be entitled, **as**
15 **Subcontractor’s exclusive remedy**, to an extension of time reasonably
16 necessary to compensate for the time lost due to the delay, but only if
17 Subcontractor shall notify Contractor in writing within twenty four (24)
18 hours after such occurrences, and only if Contractor shall be granted such
19 time extension by Owner.”

20 This clause was not stricken by the Helix Addendum.

21 12. The Subcontract also provided at Section 6.7 that “Contractor shall not be liable to
22 Subcontractor for delays caused by reason of fire or other casualty, or on account of riots, strikes,
23 labor trouble, terrorism, acts of God, cataclysmic event, or by reason of any other event or cause
24 beyond Contractor’s control, or contributed to by Subcontractor.” Section 6.7 was not stricken
25 from the Subcontract by the Helix Addendum.

26 13. Section 7.1 also states: “Contractor may order or direct changes, additions,
27 deletions or other revisions in the Subcontract work without invalidating the Subcontract. No
28 changes, additions, deletions, or other revisions to the Subcontract shall be valid unless made in
writing. Subcontractor markup 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.” (emphasis added).

 14. Similarly, Section 7.2 as modified by the Helix Addendum, provided:

1 “Subcontractor, prior to the commencement of such changed or revised
2 work, shall submit, (within 5 days of Contractor’s written request) to
3 Contractor, written copies of the breakdown of cost or credit proposal,
4 including work schedule revisions, for changes, additions, deletions, or
5 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.” (emphasis added).

6 15. Finally, the parties specifically negotiated additional language that was included in
7 Section 6 by the Helix Addendum since Helix’s price contained general conditions for the longer,
8 original Project duration. As a result, the parties agreed:

9 “In the event the schedule as set forth above is changed by Contractor for
10 whatever reason so that Subcontractor either is precluded from
11 performing the work in accordance with said schedule and thereby suffers
12 delay, or, is not allowed the number of calendar days to perform the work
13 under such modified schedule and must accelerate its performance, then
14 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.***” (emphasis added).

15 16. “The Subcontract also had an enforceable payment schedule for claims in Section
16 4.4 of the Subcontract—as amended by the Helix Addendum: as follows:

17 “Progress payments will be made by Contractor to Subcontractor within
18 10 calendar days after Contractor actually receives payment for
19 Subcontractor’s work from Owner. The progress payment to
20 Subcontractor shall be one hundred percent (100%) of the value of
21 Subcontract work completed (less 10% retention) during the preceding
22 month as determined by the Owner, less such other amounts as Contractor
23 shall determine as being properly withheld as allowed under this Article or
24 as provided elsewhere in this Subcontract. The estimates of Owner as to
25 the amount of Work completed by Subcontractor shall be binding upon
26 Contractor and Subcontractor and shall conclusively establish the amount
27 of Work performed by Subcontractor. As a condition precedent to
28 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

1 shall be conditioned upon receipt of the actual payments by Contractor
2 from Owner. Subcontractor herein agrees to assume the same risk that the
3 Owner may become insolvent that Contractor has assumed by entering
into the Prime Contract with the Owner per NRS Statutes.”

4 17. The Subcontract also incorporated the Contract, which would include the claim
5 procedures set forth in the Contract. *See* JX011, Section 1.1. Those claim requirements are set
6 forth in JX003.

7 **B. City Delays**

8 18. The City issued its notice to proceed to APCO on January 11, 2012. The original
9 Contract completion date was January 11, 2013.

10 19. APCO started work on the Project on approximately January 16, 2012.

11 20. Helix mobilized its equipment and started work full time on or about February 20,
12 2012.

13 21. Helix assigned Kurt Williams as its Project manager. Mr. Williams was rarely on
14 site and never signed in using APCO’s sign in sheets that were maintained at the Project site. Mr.
15 Williams’ time devoted to the Project was not tracked in Helix’s certified payroll reports, only
16 Helix’s job cost report.

17 22. Richard Clement was Helix’s Project superintendent. Superintendent Clement was
18 on site occasionally and only signed in with APCO at the Project twice during 2012. As the
19 Project Superintendent, Superintendent Clement was paid an hourly wage of \$62.16. *See* JX201.

20 23. Rainer Prietzel was Helix’s foreman overseeing work in the field. Foreman
21 Prietzel was paid an hourly rate of either \$56.28 or \$60.81 depending on the trade work he was
22 doing in the field. *See* DX201.

23 24. Helix’s original line item for its general conditions, as reflected in its pay
24 application, was \$108,040 on a Subcontract price of \$2,380,085, which represents 4.5%. *See*
25 JX052.

26 25. The parties have stipulated that the Contract time was extended from January 2013
27 into November 2013 through no fault of either APCO or Helix. *See* Pretrial Statement.
28

1 26. On January 9, 2013, APCO submitted its first request for an extension of time to
2 the City. *See* JX078.

3 27. On January 28, 2013, Helix provided notice to APCO that it was reserving its rights
4 to submit a claim for “all **additional costs incurred** due to scheduled delays for this project.” *See*
5 JX012. At that time, Helix did not request or present any time driven costs.

6 28. Through no fault of APCO, Helix did not take delivery of various light poles and
7 related equipment until approximately January 30, 2013. *See* JX010 (p. 1335).

8 29. Superintendent Clement did not work on the Project between June 11, 2012 and
9 September 26, 2012. Superintendent Clement only worked two weeks on the Project from
10 September 27, 2012 to October 7, 2012. Superintendent Clement did not work on the Project from
11 October 8, 2012 through January 20, 2013. In all of 2013, which was the extended Project time,
12 Superintendent Clement only worked 32 hours during the week ending January 27, 2013. *See*
13 DX203.

14 30. Helix did not replace Superintendent Clement with another Project superintendent
15 after he last worked on the Project on January 27, 2013.

16 31. At no time during the extended duration was Foreman Prietzel ever paid
17 superintendent wages. *See* DX201.

18 32. As of April 30, 2013, Helix had only billed 92% of its original general conditions
19 line item. *See* JX014.

20 33. On May 9, 2013, APCO submitted its second request for additional time and
21 compensation to the City. *See* JX015. As of that date, the City had not made a decision on
22 APCO’s first request for time.

23 34. Through May 31, 2013, Helix had billed only 94.41% of its general conditions for
24 the Project. *See* JX016.

1 35. Helix substantially completed its work in May 2013 such that Helix reduced its
2 onsite crew to one person, Foreman Prietzel. Foreman Prietzel was the only Helix person on-site
3 through the balance of 2013. *See* JX005, JX006, DX201, and DX202.

4 36. On June 19, 2013, APCO and Helix exchanged emails regarding various Project
5 issues, including Helix's delay rates. APCO confirmed that if Helix submitted a request for
6 compensation that it would be forwarded to the City. *See* JX018.

7 37. On June 19, 2013 Helix provided a supplemental notice of claim but did not
8 provide any back up to support its daily rates or the impacts alleged to be attributed to the delay.
9 *See* JX017. At that time, Helix still only had Foreman Prietzel working on site.

10 38. On June 21, 2013 Helix and APCO exchanged emails wherein APCO questioned
11 the support for Helix's claimed costs, noting that a project manager was considered home office
12 overhead. Helix indicated that its job cost reports would reflect the actual costs for the extended
13 overhead. *See* JX019.

14 39. From May 6, 2013 through November 6, 2013, Foreman Pretzel was the only Helix
15 person on site. Foreman Prietzel confirmed that during that time period he was either working on
16 completing original Subcontract work for which Helix would be paid or change order work that
17 was acknowledged and paid by APCO and the City.

18 40. During construction, the City made changes or otherwise caused issues that
19 impacted Helix. In those instances, Helix submitted a request for additional compensation and the
20 City issued APCO change orders that compensated Helix for the related impacts. During the
21 extended Contract time, the City issued eleven change orders that resulted in additional
22 compensation to Helix through the Subcontract. *See* JX066-077. Helix's pricing for the change
23 orders included a 10% markup on materials and a 15% markup on labor to cover Helix's
24 overhead. *See* JX068 (p. 1179); JX069 (p. 1194–1195); JX070 (p. 1208); JX071 (p. 1215); JX072
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1 (p. 1227); JX073 (p. 1234–1235); JX074 (p. 1242); JX075 (p. 1248); JX076 (p. 1256); and JX077
2 (p. 1264).

3 41. On August 28, 2013, APCO presented to the City Helix’s invoice for extended
4 overhead in the amount of \$102,400. *See* JX021. Helix did not provide any support for its
5 claimed costs. The City rejected that claim. *Id.*

6 42. On October 2, 2013, the City issued its decision on APCO’s request for additional
7 time and compensation. The City determined that the time period from January 11, 2013 to May
8 10, 2013 was an excusable but not compensable delay. That meant that APCO was not charged
9 liquidated damages, but also was not provided compensation from January thru May 10, 2013.
10 The City did confirm that it would pay APCO \$560,724.16 for the delay from May 10, 2013 to
11 October 25, 2013. *See* JX022. APCO accepted that determination on or about October 10, 2013.
12 *Id.*

13 43. On October 3, 2013, APCO transmitted to Helix the City’s rejection of its invoice
14 for extended overhead. *See* JX021 (p. 109).

15 44. On October 18, 2013, Helix submitted its pay application for the time period up
16 through October 30, 2013. At that time, Helix billed its general conditions line item at 100%. *See*
17 JX023.

18 45. Also on October 18, 2013, Helix submitted its pay application for the release of
19 retention. As with prior pay applications, Helix enclosed a conditional waiver. The release was
20 conditioned on APCO issuing a final payment in the amount of \$105,677.01 and expressly
21 confirmed that there were “zero” claims outstanding. *See* JX024 (p. 070). Helix signed and
22 provided that release to APCO after receiving the City’s rejection of its extended overhead
23 invoice.

24 46. On October 31, 2013, Helix submitted an invoice for \$111,847 for extended
25 overhead. The only support for the alleged costs was a one page summary chart that was based
26

1 upon an assumed four hours a day for a Project Manager and four hours for a Superintendent, even
2 though neither Project Manager Williams or Superintendent Clement was on site after January
3 2013. *See* JX020.

4 47. On November 12, 2013, APCO forwarded Helix's revised extended overhead
5 invoice of \$111,847 on to the City. *See* JX025. At that time, APCO confirmed to Helix's Kurt
6 Williams that there would be no APCO approval unless and until the City approved Helix's
7 request. *Id.* at p. 127.

9 48. The City rejected Helix's request on or about November 13, 2013. *See* JX025
10 (p. 122).

11 49. On or about November 13, 2013, Helix submitted an additional invoice for \$26,304
12 for extended overhead for September and October 2013. APCO passed that invoice through to the
13 City on or about November 18, 2013. The City rejected that request on December 4, 2013. *See*
14 JX026 (p. 136).

16 50. On January 28, 2014, APCO sent Helix's Victor Fuchs and Bob Johnson an email
17 confirming that he was meeting with the City to discuss the remaining change order issues on
18 February 4, 2014. *See* JX027 (p. 251). At that time, the City advised APCO that it was rejecting
19 Helix's claim because it had no merit and Helix only had one person on the Project while
20 completing Helix's contract work in 2013. APCO's Mr. Pelan reported the City's position to
21 Helix.

23 51. The Subcontract incorporated APCO's prime contract with City in Section 1.1.
24 *See* JX011. JX003 sets forth the City's claims procedure for requests for payment that are
25 escalated to claims. These provisions were incorporated into the Subcontract. Helix did not
26 request that APCO initiate these proceedings on its behalf regarding the claim for extended
27 overhead.

1 52. Additionally, Helix did not maintain or present accurate or complete records of its
2 actual overhead costs incurred nor present actual costs and supporting documents every month as
3 required by the City's claim procedures.

4 53. On March 31, 2014, the City and APCO agreed that there would be no further
5 COR's submitted on the Project. *See* JX028.

6 54. On April 16, 2014, Helix's Victor Fuchs threatened to convert the outstanding
7 issues into a claim if Helix's retention was not released per its pay application and release that
8 were submitted on October 18, 2013. *See* JX027 (p. 252).

9 55. The City issued the formal notice of completion of the project on July 8, 2014. *See*
10 JX031.

11
12 **C. Helix Releases All Claims**

13 56. On October 21, 2014, APCO issued check number 1473 in the amount of \$105,679,
14 which represented final payment of Helix's retention, in accordance with the October 18, 2013
15 retention billing and related final release. *See* JX034 and JX024.

16 57. On October 29, 2014, APCO tendered the check and another signed release for
17 final payment. That release mirrored the one that Helix submitted in October 2013. *See* JX035.

18 58. On October 29, 2014, Helix's Victor Fuchs sent an email to Mr. Pelan stating "this
19 is not going to work. Mr. Pelan responded that same day stating: "Victor, make changes for me to
20 approve. Thanks." *See* JX038.

21 59. The parties never agreed to any reservation and Helix received the funds on
22 October 29, 2014. *See* JX037 and JX040.

23 60. The negotiation of check number 1473 on October 29, 2014 triggered the condition
24 in the final release submitted by Helix. *See* JX024.

1 61. On October 30, 2014, the day after negotiating the final payment check, Helix
2 tendered a signed final lien release that purported to reserve Helix's extended overhead invoices in
3 the amount of \$138,151. *See* JX041–043.

4 **D. Helix Has Not Proven Causation or Recoverable Costs**

5 62. Even if the Court were to consider Helix's claim, Helix has not established how its
6 costs actually increased due to the extended time on the Project given its demobilization and
7 reduction in crew size. Foreman Prietzel was the only person on site after May 6, 2013 and he
8 was completing base Subcontract work and change order work that was paid by the City. *See*
9 DX202.

11 63. Helix's total labor spent in 2013 after the original completion date was \$167,390.
12 *See* DX202. Helix is claiming general conditions of \$138,000, or 87% of labor costs to manage
13 the Project.

14 64. Helix claimed \$53,300 for a project manager in 2013. Yet Helix's job cost
15 confirms that Helix only charged \$36,711.50 for the entire duration of the Project for a project
16 manager. *See* DX212.

17 65. According to the Helix job cost and revenue received, Helix made a 32% profit of
18 \$769,442.89 on an adjusted Subcontract price of \$2,393,113.89. *See* DX212 and JX065.

19 66. Based on its job cost report, Helix could only support costs in the claimed
20 categories totaling \$40,042.04. *See* DX205. But even that figure does not account for the revenue
21 earned by Helix in the extended performance time, which was \$399,823.72. *See* DX211. And of
22 that amount, \$92,813.72 was change orders that incorporated 10% markup on materials and 15%
23 markup on labor thereby covering Helix's claimed overhead costs during the extended period. *See*
24 DX211 and change orders submitted as JX068 to JX077. *See* JX068 (p. 1179); JX069 (p. 1194–
25 1195); JX070 (p. 1208); JX071 (p. 1215); JX072 (p. 1227); JX073 (p. 1234–1235); JX074 (p.
26 1242); JX075 (p. 1248); JX076 (p. 1256); and JX077 (p. 1264).

67. Since the City determined that the delays through May 13, 2013 were not compensable, the only time period that APCO recovered payment for its delay costs was May 13, 2013 through October 13, 2013. During that same compensable time period, Helix's job cost only shows costs in the claimed categories totaling \$23,399.04. *See* DX206. Again, Helix was earning revenue and being paid during this time period to cover these expenses. *See* JX065.

68. Helix also has produced no records that show what equipment it had on site from and after January 2013. Helix personnel admitted that there were equipment records that would prove this cost, but Helix has not produced them in discovery or at trial.

Any of the foregoing findings of fact that would be more appropriately considered conclusions of law should be deemed so.

II. CONCLUSIONS OF LAW

A. Helix Waived and Released its Claim.

1. “Waiver requires the intentional relinquishment of a known right.”¹

2. “[A]bsent some countervailing reason, contracts will be construed from the written language and enforced as written”.²

3. On October 18, 2013, the Senior Vice President of Helix, Robert D. Johnson, signed a “Conditional Waiver and Release Upon Final Payment”. *See* JX024 (p. 70).

4. In pertinent part, the Release provided that “[u]pon receipt by the undersigned of a check in the above referenced Payment Amount payable to the undersigned, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release [all claims with the exception of Disputed Claims referenced in the Release]....”

5. The Release provided that there was “Zero” as the “Amount of Disputed Claims”.

6. As such, the Release covered all claims arising out of the Project.

¹ *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007) (internal citations omitted).

² *Ellison v. C.S.A.A.*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990).

1 7. By its plain terms, in order for the Release to become effective two (2) conditions
2 must have been met: (1) Helix's receipt of a check in the amount indicated and (2) proper
3 endorsement of the check by Helix and transfer of the funds by the bank³.

4 8. Helix never rescinded the Release.

5 9. The parties do not dispute that APCO tendered the final payment by check in the
6 amount indicated and Helix negotiated and received payment on the check.

7 10. The Court finds that the conditions to the Release were satisfied and Helix's claims
8 are thereby precluded.

9 11. Helix's arguments against such a conclusion are unpersuasive and contrary to
10 established law.

11 12. Indeed, "[n]o principle is better settled than that a party cannot rescind a contract
12 and at the same time retain possession of the consideration, in whole or in part, which he has
13 received under it. He must rescind *in toto*, or not at all." *Bishop v. Stewart*, 13 Nev. 25, 41 (1878).

14 13. The simple fact that Helix cashed the check forecloses its subsequent attempt to
15 rescind the Release. *Bergstrom v. Estate of DeVoe*, 109 Nev. 575, 577, 854 P.2d 860, 861 (1993)
16 ("When a contract has been partially performed, and one of the parties to it makes default, the
17 other has a choice of remedies. He may and he must rescind or affirm the contract, *but he cannot*
18 *do both*. If he would rescind it, he must immediately return whatever of value he has received
19 under it, and then he may defend against an action for specific performance ... and he may recover
20 back whatever he has paid.... ***He cannot at the same time affirm the contract by retaining its***
21 ***benefits and rescind it by repudiating its burdens.***" (emphasis added)).

22 14. As a matter of fundamental contract law, even if Helix's email could be construed
23 as somehow preventing a condition of the Release from being fulfilled, which it did not, Helix
24

25 ³ The utilization of commas, or to be more accurate the lack of a comma after the word
26 "endorsed" and prior to the word "and", indicates that proper endorsement and transfer of funds
27 are considered a single condition. [Release ("Upon receipt by the undersigned of a check in the
28 above referenced Payment Amount payable to the undersigned, and when the check has been
properly endorsed and has been paid by the bank on which it is drawn, this document becomes
effective to release" (emphasis added))]

1 could not act to prevent a condition from occurring and then utilize its failure to claim the Release
2 was invalid or unenforceable.

3 15. “[A]n individual who voluntarily prevents the occurrence of a condition established
4 for his or her benefit is estopped from seeking relief from a contract on the grounds that the
5 condition precedent to his obligation failed to occur.” *NGA #2 Liab. Co. v. Rains*, 113 Nev. 1151,
6 1161, 946 P.2d 163, 169 (1997) (quoting *Broussard v. Hill*, 100 Nev. 325, 330, 682 P.2d 1376,
7 1379 (1984)).

8 16. Put another way, even if Helix’s actions somehow prevented a condition of the
9 Release from being fulfilled (which they did not), no action on the part of Helix would legally
10 allow Helix to ignore the Release or otherwise nullify its effect.

11 17. It is black letter law that a party who has prevented performance may not take
12 advantage of such prevention.⁴

13 18. Helix’s protest regarding the tendered check could not act to modify or invalidate
14 the Release as a matter of law.

15 19. The Court concludes that the Release is fully enforceable and fully bars Helix’s
16 claim.

17 **B. The Damages Sought by Helix are Precluded Under the Parties’ Agreement.**

18 20. Given the Court’s determination regarding the effect of the Release it is
19 unnecessary to its ultimate ruling to address the Parties’ contractual agreements relating to
20 whether an award of delay damages is even allowed under the Subcontract.
21
22

23 ⁴ “‘It is a principle of fundamental justice that if a promisor is himself the cause of the failure of
24 performance, either of an obligation due him or of a condition upon which his own liability
25 depends, he cannot take advantage of the failure.’” *Cladianos v. Friedhoff*, 69 Nev. 41, 46, 240
26 P.2d 208, 210 (1952); *see also* 9 Am.Jur. 74 (Building and Construction Contracts, § 117.)”;
27 *Cladianos*, 69 Nev. at 48–49, 240 P.2d at 211 (“In cases such as the one before us, where it is the
28 other party to the contract who is guilty of the breach *or of prevention of performance*, the
complaining party is not limited to quantum meruit. True, he may *elect* to recover in quantum
meruit (as certain of appellant’s authorities indicate) *but may also elect to stand upon the*
contract.) (emphasis added).

1 21. However, the Court will briefly address the Subcontract as it forms an independent
2 basis for the denial of any award to Helix.

3 22. As stated in the Findings of Fact above, Section 6.5 of the Parties' Subcontract
4 limits Helix's rights in the event of delays caused by "any act or neglect of the Owner or
5 Architect, or by agents or representatives of either, or by changes ordered in the Work, or by fire,
6 unavoidable casualties, national emergency, or by any cause other than [SIC] the intentional
7 Interference of Contractor" to "an extension of time reasonably necessary to compensate for the
8 time lost due to the delay." *See* JX011.

9 23. Within the Helix Addendum, additional language was added to Section 6
10 specifying the damages Helix would be entitled to for delays caused by APCO.⁵

11 24. The Court concludes that there is no conflict between these provisions, as by their
12 plain terms, Section 6.5 of the Subcontract precludes damages for delays that are caused by
13 someone or something other than APCO, while the Helix Addendum adds language to define the
14 damages awardable to Helix in the event a delay is caused by APCO.

15 25. To the extent the Helix Addendum could somehow be construed as being in
16 conflict, the Court finds that cardinal rules of contract interpretation demand the same result.

17 26. Contractual provisions should be harmonized whenever possible⁶ and construed to
18 reach a reasonable solution.⁷

19 27. Had the language added by Helix in the Helix Addendum been intended to render
20 meaningless the original language in Section 6.5 they surely would have indicated that the portion
21 _____

22 ⁵ ("In the event the schedule as set forth above is changed by Contractor for whatever reason so
23 that Subcontractor either is precluded from performing the work in accordance with said schedule
24 and thereby suffers delay, or, is not allowed the number of calendar days to perform the work
25 under such modified schedule and must accelerate its performance, then Subcontractor shall be
26 entitled to receive from Contractor payment representing the costs and damages sustained by
27 Subcontractor for such delay or acceleration, providing said costs and damages are first paid to
28 Contractor.").

27 ⁶ *Royal Indem. Co. v. Special Serv.*, 82 Nev. 148, 151, 413 P.2d 500, 502 (1966)

28 ⁷ *Eversole v. Sunrise Villas VIII Homeowners Ass'n*, 112 Nev. 1255, 1260, 925 P.2d 505, 509
(1996) (citing *Fisher Properties v. Arden-Mayfair, Inc.*, 106 Wash.2d 826, 726 P.2d 8, 15 (1986)).

1 of the original language of Section 6.5 was to be deleted, as was done in relation to other
2 modifications contained in the Helix Addendum.⁸

3 28. Having not so indicated, it is clear that the language in Section 6.5 was not intended
4 to be deleted or otherwise modified.

5 29. As such, these provisions must be read to give effect to every word and harmonize
6 any perceived inconsistency.

7 30. When harmonized these two provisions discuss the events that allow Helix to
8 recover costs and the events that only allow Helix to obtain an extension of time.

9 31. Specifically, the events that provide the sole remedy of an extension of time are
10 delays caused by the anyone or anything other than intentional interference by APCO.⁹

11 32. Whereas, the events that allow Helix to recover costs are changes in the schedule
12 caused by APCO itself.¹⁰

13 33. This construction gives effect to every word in the contract and harmonizes the
14 language to reach a reasonable resolution.

15 34. Similarly, this construction gives effect to Section 6.7 of the Subcontract which
16 was also unaffected by the Helix Addendum.

17 35. Any other interpretation would render Section 6.7 partially meaningless.¹¹
18

19
20 ⁸ [See e.g., Helix Addendum (“[t]he following terms will be added to or replace portions of the
21 paragraphs in the Subcontract.”); *id.* (“Section 4, Paragraph 4.2: Revise to read as follows:”); *id.*
22 (“Section 4, Paragraph 4.6: Revise as follows: Third line delete ... [a]nd replace with....”) *cf.*
23 (Section 6 “Add”)].

24 ⁹ [Subcontract at Section 6.5 (“any act or neglect of *the Owner* or Architect, or by agents or
25 representatives of either, or by changes ordered in the Work, or by fire, unavoidable casualties,
26 national emergency, or by any cause other that [SIC] the intentional Interference of Contractor”
27 (emphasis added))].

28 ¹⁰ [Helix Addendum (“In the event the schedule as set forth above is changed by Contractor”)].

¹¹ [Subcontract Section 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.” (emphasis added))].

1 36. Moreover, this interpretation is supported by the fact that even if the language
2 added by Helix were intended to cover any delay no matter who or what caused it, it is a cardinal
3 rule of contract interpretation that a more specific provision controls over a general provision if
4 they are in conflict; *i.e.*, that the more specific provision is construed as an exception to the
5 general provision. RESTATEMENT OF THE LAW (CONTRACTS), § 236(C).

6 37. Under such an interpretation, the language added by Helix would be general as
7 applying to every instance of delay, whereas the language of Section 6.5 would be specific as
8 applying specifically to delay caused by “any act or neglect of the Owner or Architect, or by
9 agents or representatives of either, or by changes ordered in the Work, or by fire, unavoidable
10 casualties, national emergency, or by any cause other than [SIC] the intentional Interference of
11 Contractor”.

12 38. As such, the specific provision would control in relation to delay caused by any act
13 or neglect by the Owner.

14 39. This interpretation is similarly supported by the fact that a plaintiff should only be
15 entitled to recover damages actually caused by the defendant; a concept consistently applied to
16 claims for delay damages in the construction context.¹²

17 40. Because the Parties have stipulated that the delays were not caused by APCO, no
18 damages are awardable to Helix under the plain terms of the Subcontract.

19 **C. The No Delay Damages Clause is Enforceable.**

20 41. The Court further concludes that the Subcontract’s exclusion of delay damages in
21 the context of this case is enforceable.¹³

24 ¹² See *e.g.*, *Structural Sales, Inc. v. Vavrus*, 132 Ill. App. 3d 718, 721, 477 N.E.2d 745, 748 (1985)
25 (“The party claiming damages for delay must prove that the delay was the fault of the party
26 against whom the damages are sought.”); *Phoenix Elec. Contracting, Inc. v. Lehr Const. Corp.*,
27 219 A.D.2d 467, 467–68, 631 N.Y.S.2d 146, 147 (1995) (“[A]bsent a contractual commitment to
28 the contrary, a prime contractor is not responsible for delays that its subcontractor may incur
unless those delays are caused by some agency or circumstance under the prime contractor’s
direction or control”) (quoting *Triangle Sheet Metal Works v. Merritt & Co.*, 79 N.Y.2d 801, 802,
580 N.Y.S.2d 171, 588 N.E.2d 69 (1991)).

1 42. Under Nevada law, such a provision is unenforceable in only three instances: (1)
2 delays caused by fraud, misrepresentation, concealment or other bad faith; (2) delays so
3 unreasonable in length as to amount to project abandonment; and (3) delays caused by the other
4 party's active interference.¹⁴

5 43. These exceptions "aid in enforcing the implied covenant of good faith and fair
6 dealing [that] exists in every Nevada contract and essentially forbids arbitrary, unfair acts by one
7 party that disadvantage[s] the other."¹⁵

8 44. Effectively, these exceptions are meant to exclude from such disclaimers delays
9 caused by one of the parties.

10 45. As stated above, the Parties have stipulated that the delays were not caused by
11 APCO, and therefore none of these exceptions apply.

12 46. Moreover, the Court concludes that Helix has not produced any evidence sufficient
13 to establish any of these exceptions.

14 47. As such, the Court finds that the Subcontract's preclusion of delay damages is
15 enforceable and no damages are awardable to Helix.

16 **D. Helix has Not Proven that APCO was Paid by the Owner for the Amounts at Issue.**
17 **Per the Terms of the Parties' Agreement this Precludes Helix's Damages Claim.**

18 48. Given the Court's conclusion in relation to the Release and the Subcontract's
19 exclusion of delay damages it is unnecessary for this Court to determine whether conditions within
20 the Subcontract required to be fulfilled prior to Helix being entitled to payment have been met.

21 49. However, because this forms another basis for the denial of an award to Helix the
22 Court will briefly discuss it.

25 ¹³ See e.g., *J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 285 (Nev.
26 2004) (holding that a contractual "no damages for delay" provision in a construction contract is
valid and enforceable).

27 ¹⁴ *Id.* at 286, 288.

28 ¹⁵ *Id.* at 286.

1 50. Section 4.8 of the Subcontract provides: “Subcontractor agrees that Contractor shall
2 have no obligation to pay Subcontractor for any changed or extra work performed by
3 Subcontractor until or unless Contract has actually been paid for such work by the Owner.”

4 51. Section 4.8 was not modified by the Helix Addendum.

5 52. Similarly, Section 7.2—as modified by the Helix Addendum—provides:
6 “Subcontractor, prior to the commencement of such changed or revised work, shall submit,
7 (within 5 days of Contractor’s written request) to Contractor, written copies of the breakdown of
8 cost or credit proposal, including work schedule revisions, for changes, additions, deletions, or
9 other revisions in a manner consistent with the Contract Documents. Contractor shall not be liable
10 to Subcontractor for a greater sum, or additional time extensions, than Contractor obtains from
11 Owner for such additional work.”

12 53. Even the section added by the Helix Addendum contains this same condition:
13 “...then Subcontractor shall be entitled to receive from Contractor payment representing the costs
14 and damages sustained by Subcontractor for such delay or acceleration, providing said costs and
15 damages are first paid to Contractor.”

16 54. “[A]bsent some countervailing reason, contracts will be construed from the written
17 language and enforced as written”.¹⁶

18 55. Although the condition established by these provisions may never be fulfilled in the
19 event that APCO were the cause of the delay, this is no defense to the enforcement of a condition
20 that is written into a contract.¹⁷

21 56. Helix has failed to establish that APCO was paid by the City for the amounts Helix
22 claims in this litigation.

23 57. Pursuant to the Helix Addendum, Section 4.8 and 7.2 of the Subcontract, therefor,
24 Helix’s claims are barred.

25
26
27 ¹⁶ *Ellison v. C.S.A.A.*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990).

28 ¹⁷ *Cf. Nebaco, Inc. v. Riverview Realty Co.*, 87 Nev. 55, 57, 482 P.2d 305, 307 (1971).

1 **E. In Any Event Helix Has Not Produced Sufficient Evidence to Establish Delay**
2 **Damages.**

3 58. Given the Court’s determination regarding the effect of the Release and the effect
4 of the Parties’ Subcontract it is unnecessary to its ultimate ruling to address the alleged damages
5 Helix has suffered. However, the Court will briefly address the fact that Helix has failed to proffer
6 sufficient evidence to establish any damages as another independent basis for the Court’s ultimate
7 ruling that Helix is not entitled to any damages award.

8 59. “The party seeking damages has the burden of proving both the fact of damages
9 and the amount thereof.”¹⁸

10 60. The Parties Contract requires proof of actual cost increase. *See* JX011 (p. 444).
11 Specifically, Section 7.1—which was unchanged by the Helix Addendum—provides: “Contractor
12 may order or direct changes, additions, deletions or other revisions in the Subcontract work
13 without invalidating the Subcontract. No changes, additions, deletions, or other revisions to the
14 Subcontract shall be valid unless made in writing. Subcontractor mark up shall be limited to that
15 stated in the contract documents in addition to *the direct/actual on-site cost* of the work, however,
16 no profit and overhead markup on overtime shall be allowed.” (emphasis added).

17 61. Similarly, proof of actual cost is required as a matter of law. Courts have
18 uniformly held that if evidence of an exact calculation is reasonably possible it must be presented
19 and made available to the trier of fact.¹⁹

20 62. The law is well settled that a “subcontractor’s damages for delay in construction
21 cases are measured as a general matter by ‘the extent to which its costs were increased by the
22 improper conduct, and its recovery will be limited to the damages actually sustained.’”²⁰

23
24 ¹⁸ *Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co., Inc.*, 105 Nev. 855, 856-57 (Nev.
1989).

25 ¹⁹ *See e.g., Martin v. Trinity Hosp.*, 2008 ND 176, ¶ 31, 755 N.W.2d 900, 910 (“The import of the
26 holding in those cases is that a plaintiff may offer inexact evidence on the amount of damages in a
27 breach of contract action only if there is no definite evidence available for an exact determination
28 of the damages resulting from the breach.”).

20 ²⁰ *Thalle Constr. Co. v. The Whiting–Turner Contracting Co.*, 39 F.3d 412, 417 (2d Cir.1994)
(quoting *Peter Scalmandre & Sons, Inc. v. Village Dock, Inc.*, 187 A.D.2d 496, 589 N.Y.S.2d
191 (2d Dep’t 1992)); *see also Clifford R. Gray Inc. v. State*, 251 A.D.2d 728, 729, 674 N.Y.S.2d

63. Courts have uniformly held that in the construction context delay damages must be proved precisely if such information is available.²¹

64. “To prove damages, however, a plaintiff must present sufficient evidence for the fact-finder to make an intelligent estimation, without conjecture, of the amount to be awarded. *It is incumbent on a contractor not only to quantify the damages but also to connect the alleged losses to the particular incident of delay.*”²²

65. Helix has admitted that precise calculations of its alleged losses were in its possession.

66. Despite this, Helix has failed to either produce these documents or present them at trial.

67. The Court therefore finds that even if monetary delay damages are awardable—despite being contrary to the Subcontract and the Release—itemized actual losses caused by the particular delays would be required to prove any delay damages in this case.

68. Helix’s failure to provide this proof further justifies the denial of any recovery. *See e.g., Lichter v. Mellon Stuart Co.*, 305 F.2d 216, 219–20 (3d Cir. 1962) (“In these circumstances

440, 442 (1998) (“It is well settled that in calculating contract damages due to delays ‘[a] contractor wrongfully delayed by its employer must establish the extent to which its costs were increased by the improper acts because its recovery will be limited to damages actually sustained’” (quoting *Berley Indus. v. City of New York*, 45 N.Y.2d 683, 687, 412 N.Y.S.2d 589, 385 N.E.2d 281); *see also, J & K Plumbing & Heating Co. v. State of New York*, 235 A.D.2d 751, 752, 652 N.Y.S.2d 369).

²¹ *Nat’l Door & Hardware Installers, Inc. v. Mirsaidi*, No. M2013-00386-COA-R3CV, 2014 WL 3002007, at *9 (Tenn. Ct. App. June 30, 2014) (“Plaintiff entered into evidence a “Summary of Extended Overhead” through its expert witness, Mr. Page. This exhibit outlined several categories of extended overhead and their weekly rates. Mr. Page testified that he based his calculations on conversations with Plaintiff’s employees, prominently Mr. Alford, and also used numbers from actual bills to create a reasonable estimate of damages, but he did not calculate the actual out-of-pocket costs over the nine-month delay period. The trial court denied recovery upon the finding the proof presented by Plaintiff consisted of ‘estimates, guessing and speculation **even though more reliable sources existed to quantify actual loss.**’ For several reasons, we agree.”)(emphasis added); *Moore Constr. Co., Inc. v. Clarksville Dep’t of Elec.*, 707 S.W.2d 1 (Tenn.Ct.App.1985).

²² *A.G. Cullen Const., Inc. v. State Sys. of Higher Educ.*, 898 A.2d 1145, 1160–61 (Pa. Commw. Ct. 2006) (emphasis added), *disapproved on other grounds by A. Scott Enterprises, Inc. v. City of Allentown*, 636 Pa. 249, 142 A.3d 779 (2016); *see also Lichter v. Mellon Stuart Co.*, 305 F.2d 216, 219–20 (3d Cir. 1962) (“In these circumstances Southern’s inability to break down its lump sum proof of extra costs justifies the denial of any recovery”).

1 Southern's inability to break down its lump sum proof of extra costs justifies the denial of any
2 recovery").

3 **F. Prevailing Party Determination.**

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

8 70. This provision was not modified by the Helix Addendum.

9 71. N.R.S. 18.010 provides that "compensation of an attorney or counselor for his or
10 her services is governed by agreement...."

11 72. N.R.S. 18.020 further provides that "[c]osts must be allowed of course to the
12 prevailing party against any adverse party against whom judgment is rendered ... [i]n an action for
13 the recovery of damages of money or damages, where the plaintiff seeks to recover more than
14 \$2,500."

15 73. The Court finds that based on the foregoing APCO is the prevailing party and is
16 therefore entitled to an award of its attorneys' fees and costs.

17 74. For the foregoing reasons the Court finds that Helix is not entitled to any damages
18 and Judgment must be entered in APCO's favor.

19 Any of the foregoing conclusions of law that would be more appropriately considered
20 findings of fact should be deemed so.

21 DATED this May 31, 2019.

22
23 **FENNEMORE CRAIG, P.C.**

24 By: /s/ John Randall Jefferies

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

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

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

28 FENNEMORE CRAIG, P.C.

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CERTIFICATE OF SERVICE

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

DATED: May 31, 2019.

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

Case No.: A-16-730091-C

Trial Date: June 3, 2019

Dept. No.: XI

Judge: The Honorable Judge Gonzalez

Court Clerk: _____

Plaintiff: Helix Electric of Nevada, LLC

Recorder: _____

Counsel for Plaintiff: Cary B. Domina, Esq. of the law
firm of Peel Brimley LLP

vs.

Defendant: APCO Construction; Safeco
Insurance Company of Nevada

Counsel for Defendant: John Randall Jefferies, Esq.
Of the law firm of Fennemore Craig, P.C

TRIAL BEFORE THE COURT

JOINT EXHIBITS

Exhibit Number	Bates No.(s)	Exhibit Description	Date Offered	Objection	Date Admitted
JX001	APCO000001- APCO000003	APCO Craig Ranch Regional Park - Phase II Project Change Order Log	✓		
JX002	APCO000479- APCO000731	Certified Payroll Reports	✓		
JX003	APCO000437- APCO000438	Pages 44-45 of the Prime Contract	✓		
JX004	APCO000166- APCO000436	Daily Sign In Log	✓		
JX005	APCO000732- APCO001068	Helix Daily Reports	✓		
JX006	HEL000659- HEL000725	Helix Daily Reports - supplement	✓		
JX007	HEL000450	December 20, 2011 Performance Bond			
JX008	HEL000451	December 20, 2011 Labor and Material Payment Bond			
JX009	HEL000452- HEL000453	December 20, 2011 Guarantee Bond			
JX010	APCO001269- APCO001281; APCO001335	March 15, 2012 Graybar Electric Purchase Order			
JX011	APCO000439- APCO000478	April 4, 2012 Craig Ranch Regional Park - Phase II Subcontract Agreement	✓		
JX012	HEL000456	January 28, 2013 Letter from Kurk Williams to Brian Bohn regarding Schedule delay/Extended overhead (Bob Johnson Deposition Ex. 7)	✓		
JX013	APCO000059- APCO000060	January 29, 2013 Email to Helix from APCO RE Schedule Delay	✓		
JX014	HEL00531- HEL00536	April 19, 2013 Helix's Invoice No. 16113-015 in the amount of \$157,890.00 (Bob Johnson Depo Ex. 1)	✓		

EXHIBIT(S) LIST

Exhibit Number	Bates No.(s)	Exhibit Description	Date Offered	Objection	Date Admitted
JX015	APCO000008– APCO000019	Correspondence from APCO to CNLV dated May 9, 2013	✓		
JX016	APCO001323– APCO001328	May 20, 2013 Invoice # 161113–016 for \$157,130.00, Application and Certificate for Payment, and Conditional Waivers (Bob Johnson Deposition Ex. 2)	✓		
JX017	HEL000461	Correspondence from Helix to APCO dated June 19, 2013 regarding Extended Overhead Costs	✓		
JX018	APCO000040– APCO000041	June 19, 2013 APCO Email between Brian Bohn (APCO) and Kurk Williams (Helix)	✓		
JX019	APCO000052– APCO000054	June 21, 2013 Email to Joe Pelan and Brian Bohn from Kurk Williams RE: Craig Ranch Delay Notice (Helix)	✓		
JX020	HEL000464– HEL000467	August 27, 2013 Helix Electric Invoice to APCO RE: Extended Overhead for a Total of \$111,847.00	✓		
JX021	APCO000106– APCO000115	September 3, 2013 COR #68 & CNLV Response and Letter from APCO to Helix requesting back-up to substantiate amount	✓		
JX022	APCO000006– APCO000007; APCO000005	Correspondence from CNLV to APCO dated October 2, 2013	✓		
JX023	APCO001329– APCO001333	October 18, 2013 Invoice # 161113–021 for \$129,973.50, Application and Certificate for Payment, and Conditional Waivers (Bob Johnson Deposition Ex. 4)	✓		
JX024	APCO000066– APCO000070	October 18, 2013 Application and Certificate for Payment and Conditional Waiver and Release Upon Final Payment	✓		
JX025	APCO000117– APCO000130	November 6, 2013 COR #68.1 & CNLV Response	✓		
JX026	APCO000132– APCO000140	November 18, 2013 COR #93 & CNLV Response	✓		
JX027	HEL000251– HEL000254	January 28, 2014 Email to Victor Fuchs and Bob Johnson from Joe Pelan RE: Craig Ranch – Scheduled Meeting on February 4	✓		
JX028	APCO000038	March 17, 2014 City of Las Vegas Construction Conflict Authorization No. 00062 to APCO	✓		
JX029	HEL000255– HEL000257	April 16, 2014 Email to Victor Fuchs from Joe Pelan RE: Craig Ranch Park – Restoration	✓		

EXHIBIT(S) LIST

Exhibit Number	Bates No.(s)	Exhibit Description	Date Offered	Objection	Date Admitted
JX030	HEL000493– HEL000519	City Council Meeting Minutes (July 2, 2014)	✓		
JX031	HEL000426	July 8, 2014 Proof of recordation of Notice of Completion			
JX032	HEL00537	Correspondence from Helix to APCO dated September 26, 2014 regarding Demand for Payment	✓		
JX033	HEL00538– HEL000541	October 15, 2014 Email from Kurk Williams to Eddie Bennett FW: Craig Ranch Delay Notice (Helix)	✓		
JX034	APCO000079– APCO000080	October 21, 2014 Check #1473 for \$105,679.00 to Helix Electric from APCO	✓		
JX035	APCO000071– APCO000074	October 29, 2014 Email from APCO to Helix regarding Check and attachments	✓		
JX036	APCO000075– APCO000078	October 29, 2014 Email exchange between Helix and APCO	✓		
JX037	APCO001334	October 29, 2014 copy of posted check #1473 for \$105,679.00 to Helix Electric from APCO (Bob Johnson Deposition Ex. 10)	✓		
JX038	HEL000382– HEL000383	October 29, 2014 Email to Victor Fuchs from Joe Pelan RE: Craig Ranch Change Approval	✓		
JX039	HEL000427	October 29, 2014 APCO Construction Unconditional Waiver and Release Upon Final Payment	✓		
JX040	APCO001322	Bank of Nevada to APCO Business Analysis Account with October 29, 2014 check detail	✓		
JX041	APCO000081– APCO000082	October 30, 2014 Email from Helix to APCO with executed Unconditional	✓		
JX042	HEL000405– HEL000407	October 30, 2014 Unconditional Waiver and Release Upon Final Payment, Letter Helix to APCO RE: 10/29/2014 Unconditional Waiver and Release Upon Final Payment, and Invoice for Extended Overhead for a Total of \$138,151.00	✓		
JX043	HEL000490– HEL000491; HEL000489	Correspondence from Helix to APCO dated October 30, 2014 regarding Unconditional Waiver	✓		
JX044	HEL000415– HEL000419	January 13, 2015 Email to Joe Pelan from Victor Fuchs RE: Promissory Note	✓		
JX045		NOT USED			
JX046	APCO000063– APCO000064	December 18, 2015 Letter to Cary Domina from Joe Pelan RE: Craig Ranch Park – Phase II	✓		

EXHIBIT(S) LIST

Exhibit Number	Bates No.(s)	Exhibit Description	Date Offered	Objection	Date Admitted
JX047	APCO001088– APCO001090	January 18, 2016 Email Exchange between Joe Pelan & Bob Johnson after Complaint was Filed	✓		
JX048	APCO000141	January 18, 2016 Email to Victor Fuchs from Joe Pelan RE: Claim	✓		
JX049	HEL00542– HEL00550	January 29, 2016 Email from Bob Johnson to Joe Pelan RE: Claim	✓		
JX050	HEL00551– HEL00658	Complete Craig Ranch Cost Report	✓		
JX051	HEL000001– HEL000205	Partial Job Costs Report/Payroll Records	✓		
JX052	APCO001091– APCO001095	Helix Pay Application #11 dated December 31, 2012	✓		
JX053	APCO001096– APCO001104	Helix Pay Application #12 dated January 31, 2013	✓		
JX054	APCO001105– APCO001109	Helix Pay Application #13 dated February 28, 2013	✓		
JX055	APCO001110– APCO001114	Helix Pay Application #14 dated March 31, 2013	✓		
JX056	APCO001115– APCO001120	Helix Pay Application #15 dated April 30, 2013	✓		
JX057	APCO001121– APCO001126	Helix Pay Application #16 dated May 31, 2013	✓		
JX058	APCO001127– APCO001131	Helix Pay Application #17 dated June 30, 2013	✓		
JX059	APCO001132– APCO001136	Helix Pay Application #18 dated July 31, 2013	✓		
JX060	APCO001137– APCO001141	Helix Pay Application #19 dated August 31, 2013	✓		
JX061	APCO001142– APCO001146	Helix Pay Application #20 dated September 30, 2013	✓		
JX062	APCO001147– APCO001151	Helix Pay Application #21 dated October 31, 2013	✓		
JX063	APCO001152– APCO001156	Helix Pay Application #22 (billing #1) dated October 31, 2013	✓		
JX064	APCO001157– APCO001160	Helix Pay Application #22 (billing #2) dated October 31, 2013	✓		
JX065	APCO001161– APCO001164	Helix Pay Application #22 (billing #3) dated October 31, 2013	✓		
JX066	APCO001165	Helix Change Order Log	✓		
JX067	APCO001166– APCO001173	APCO COR #5	✓		
JX068	APCO001174– APCO001185	APCO COR #57	✓		
JX069	APCO001186– APCO001201	APCO COR #58	✓		
JX070	APCO001202– APCO001209	APCO COR #59	✓		

EXHIBIT(S) LIST

Exhibit Number	Bates No.(s)	Exhibit Description	Date Offered	Objection	Date Admitted
JX071	APCO001210- APCO001222	APCO COR #61	✓		
JX072	APCO001223- APCO001229	APCO COR #64	✓		
JX073	APCO001230- APCO001236	APCO COR #65	✓		
JX074	APCO001237- APCO001243	APCO COR #70	✓		
JX075	APCO001244- APCO001251	APCO COR #71	✓		
JX076	APCO001252- APCO001258	APCO COR #75	✓		
JX077	APCO001259- APCO001268	APCO COR #77	✓		
JX078	APCO000004	APCO COR #39	✓		
JX079					
JX080					
PX101	HEL000490- HEL000481; HEL000477- HEL000478	December 14, 2015 Email String regarding Promissory Note (with Promissory Note attached)	✓	APCO Objection: Rule 408	
PX102	NA	Exhibit 20 to Joe Pelan September 8, 2017 Deposition	✓		
PX103					
PX104					
PX105					
PX106					
PX107					
PX108					
PX109					
PX110					

EXHIBIT(S) LIST

Exhibit Number	Bates No.(s)	Exhibit Description	Date Offered	Objection	Date Admitted
DX201	APCO001282– APCO001293	Helix Electric Labor Costs per Certified Payroll Reports <i>D-4</i>	✓	Helix Objects (Demonstrative)	
DX202	APCO001294– APCO001298	Helix Electric Labor Costs per Certified Payroll Reports (February 2013– November 2013)	✓	Helix Objects (Demonstrative)	
DX203	APCO001299– APCO001301	Helix Electric Certified Payroll Summary of Hours and Gross Pay & Fringe Benefits for Richard Clement and Rainer Prielzel	✓	Helix Objects (Demonstrative)	
DX204	APCO001302– APCO001317	Helix Electric Sign in Log and Certified Payroll Hours (January 2012– November 2013)	✓	Helix Objects (Demonstrative)	
DX205	APCO001318	Helix Billed Amounts for General Conditions vs. Comparison to Helix Partial Job Cost <i>D-3</i>	✓	Helix Objects (Demonstrative)	
DX206	APCO001336	Helix billed Amounts for General Conditions vs. Comparison to Helix Partial Job Accounting Provided in 2016 & 2019 May 2013 - October 2013	✓		
DX207	N/A	December 28, 2016 Defendants First Request for Production of Documents and Things to Helix Electric of Nevada		Helix Objects (Pleadings/ Court Documents)	
DX208	APCO000057– APCO000058	September 7, 2017 Affidavit of Joemel Llamado		Helix Objects (Affidavit no chance to cross)	
DX209	N/A	October 13, 2017 Defendants' Second Request for Production of Documents and Things to Helix Electric of Nevada, LLC		Helix Objects (Pleadings/Court Documents)	
DX210	N/A	October 22, 2018 Fourth Amended Notice of Taking NRCP Rule Deposition of Person Most Knowledgeable for Helix		Helix Objects (Pleadings/Court Documents)	
DX211	APCO001337	Helix Electric – Craig Ranch Park Phase II Payments and Release Dates	✓		
DX212	APCO001338	Summary of Helix Electric Accounting Report Dated 05/23/2019	✓		
DX213	APCO001339	November 12, 2018 Email from C. Domina to M. Bacon re Project Monthly Equip List			
DX214					
DX215					