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# Construction Law 2024

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## **USA – Nevada: Law & Practice**

Leon F Mead

Mead Law Group



# USA – NEVADA



## Law and Practice

### Contributed by:

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**Mead Law Group** has been handling construction law matters almost exclusively for over 30 years. The firm is primarily devoted to representation of all construction industry groups in public and private construction-related matters. These include, but are not limited to, contracts, preparation, litigation, arbitration and mediation, licensing, and construction-related administrative issues. Dedicated to development of Nevada laws that impact construction, Mead Law Group's attorneys advise their clients and

industry partners on the extensive and unique laws affecting the Nevada construction industry. They have also provided testimony before numerous state legislative committees on construction-related topics and expert analysis on Nevada construction legal issues, and often conduct seminars for construction industry groups. Mead Law Group provides its clients with AmLaw 200 quality legal counsel with a small law firm approach to customer service and client connection.

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## 1. General

### 1.1 Governing Law

The state of Nevada structures its law in the traditional method used in the United States, with a set of statutory codes enacted by the legislative process and approved by the executive or Governor. The statutory codes are known as the Nevada Revised Statutes (NRS) and are set out in chapters with sections identified by numeric index. The NRS can be accessed through the Nevada Legislative Counsel Bureau, at this [website](#). Of particular interest to the construction industry are the following chapters:

- Chapter 38: Mediation and Arbitration;
- Chapter 40: Constructional Defects;
- Chapters 104 & 104A: Uniform Commercial Code;
- Chapter 108: Mechanics Liens;
- Chapter 338: Public Works;
- Chapter 339: Contractors Bonds on Public Works;
- Chapter 341: State Public Works Division;
- Chapter 408: Highways, Roads and Transportation Facilities;
- Chapters 439 through 461A: Statutes related to Public Health and Safety of specific industries;
- Chapters 512 through 522: Statutes relating to Mining Activities;
- Chapters 606 through 618: Statutes related to Labor, Employment and Industrial Relations;
- Chapter 623: Architects, Interior Designers and Residential Designers;
- Chapter 623A: Landscape Architects;
- Chapter 624: Contractors;
- Chapter 625: Professional Engineers and Land Surveyors;
- Chapter 627: Construction Controls;
- Chapters 702 through 712: Energy, Public Utilities and Similar Entities.

These legislative enactments create a number of bureaucracy departments which manage different aspects of industry in the State. Most of these departments promulgate regulations and rules that govern their processes and procedures. These regulations are found in the Nevada Administrative Code, and are provided the same impact and effect as statutory provisions of the NRS by Nevada courts. The Nevada Administrative Code (NAC) can be located at this [website](#). Generally, regulations issued by specific bureaucracies will have corresponding chapter numbers that match the establishing chapter from the NRC. For instance, NAC Chapter 624 sets forth regulations governing contractors as well as the Nevada State Contractors Board established and governed by NRS Chapter 624.

In addition, each municipal jurisdiction will adopt specific standardised building code requirements that will also impact construction projects in the State. These should also be considered when applicable.

Nevada courts are established in Judicial Districts, which can preside over issues and disputes in one or more Nevada counties. The courts within each Judicial District are divided based on dispute dollar values or specific and unique dispute contexts. Generally, disputes under USD15,000 will be handled by Justice Courts within a Judicial District. Larger disputes of over USD15,000 are heard by District Courts, who also hear appeals from Justice Court decisions. District Court decisions are appealed to the Nevada Supreme Court, but can be referred to the Nevada Court of Appeals for certain specific disputes or matters considered less impactful on the State law as a whole. Decisions by the Nevada Supreme Court and the Nevada Court of Appeals designated for publication are

published in the Nevada Reports, which can be accessed [here](#).

## 1.2 Standard Contracts

Nevada does not promulgate an official set of “standardised” contracts for any purpose. However, standard “form” contracts are issued by various construction industry groups and are routinely used and modified by the parties for specific project purposes. In general, Nevada will enforce arms-length negotiated agreements, especially between businesses generally considered to be more sophisticated than consumers or the general public. Standard form contracts issued by the Architectural Institute of America (AIA) and “ConsensusDocs” issued by the “ConsensusDocs Coalition” are the most common types of standardised construction documents used in Nevada.

## 2. Parties

### 2.1 The Employer

Nevada construction projects can be started by both private persons or entities and public entities within their jurisdictions (or both). Since large portions of land in Nevada are still owned by the United States Federal Government, the United States government and its myriad bureaucracies, departments and divisions also issue construction contracts.

The essential obligations for the Owner are to provide entitlement to construct the work through jurisdictional authorities (ie, property rights), a completed design, and the funds necessary for the work of improvement to be constructed on a timely basis. Additional obligations may exist as a result of negotiations between the contractor and the owner during the pre-construction process and the selected delivery

method. While this description of the Owner’s essential obligations is over-simplistic, omitting myriad details, the responsibilities of an Owner on a construction project will generally fall within these categories.

In exchange for providing these things, the Owner has the right to expect its contractor(s) to complete the work on a timely basis and in accordance with the contract document requirements. In most instances, these include the plans and specifications, code compliance obligations, the project schedule, specific performance issues, etc.

The Owner has an obligation to make timely payment and to secure sufficient funding for the project costs. Nevada law provides contractors with strong rights to payment, including a right to a Mechanic’s Lien which encumbers the work of improvement and affected land used therefor to secure payment for the work performed. If the Owner does not make timely payment, the contractor, subcontractors, and others providing labour, materials, equipment, and services for the work of improvement have the right to place and foreclose upon a lien to secure payment. These liens generally have priority over the Owner’s interest in the work of improvement and the land, and may have priorities over the project lenders under certain circumstances.

In most instances, the Owner will hold a direct contract with the general contractor for the construction project and will provide the contractor with plans obtained from a separate design firm. Depending on the delivery method chosen, however, the general contractor may have more defined pre-construction and/or design roles. In such cases, the general contractor may be referred to as a Construction Manager at Risk (CMAR), Construction Manager as Agent

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(CMAA), or a Design/Builder. In all cases, including a typical arrangement with no defined pre-construction or design role, with the exception of a CMAA, the general contractor entity will hold and manage the subcontracts with first tier subcontractors and suppliers.

## 2.2 The Contractor

Contractors in Nevada must be licensed by the Nevada State Contractors License Board (NSCB), having demonstrated sufficient competence and financial strength to perform construction projects of various types and cost. Nevada provides three types of contractor licence classifications, as follows:

- A – General Engineering Contractor;
- B- General Building Contractor; and
- C – Trade Contractor of Specific Types.

Each of these general categories has numerous subclassifications that allow for the construction of a subset of the types of work performed.

Type A licence holders, General Engineering Contractors, are permitted to perform construction of projects that generally required more specific engineering expertise, such as roads, bridges, airports, dams, electrical power plants and transmission lines, water treatment plants, and similarly related infrastructure.

Type B licence holders, General Building Contractors, are permitted to perform construction projects that are intended for human or animal housing and function, such as office buildings, residential buildings, recreation facilities, etc.

Type C licences, Trade Contractors, are reserved for those contractors who perform specific specialised trade work, such as plumbing, framing,

steel erection, electrical installation, heating ventilation and air conditioning, etc.

A contractor can also hold a Class “AB” licence, which allows them to build any type of project, regardless of its specific function. Nevada also imposes a financial “bid limit” on all contractors, which limits the maximum value of a construction project they are lawfully able to perform. This is intended to ensure that no contractor undertakes a construction project that is beyond their corporate financial strength and ability to complete successfully. A contractor can be granted an “unlimited” licence if they can demonstrate the ability to financially handle a project in excess of USD10 million.

In the most typical construction project, the general contractor will hold the sole general or prime contract with the Owner, and will in turn hold numerous subcontracts with second-tier subcontractors and suppliers. In this case, the general contractor acts as the “manager” of the project, handling the daily workflow, sequence and schedule of the subcontractors performance, coordination with the jurisdictional authorities, and interactions with the Owner and design professionals to ensure the work in the field meets the design intent expressed in the contract documents.

## 2.3 The Subcontractors

As noted above, subcontractors fall into various categories of work performance or “trades”. There are 42 separate Class C trade licence subclassifications, including a “catch-all” classification for work that does not specifically fit into another classification but requires specialised skill as determined by the NSCB. To obtain such a licence, the subcontractor must pass examinations designed to test their competency on the specific trade work of each subclassifica-

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tion, as well as knowledge of legal and management obligations imposed under Nevada law. As with general contractors, Class C trade contractors also are provided a “bid limit” that restricts the maximum value of their contracts to ensure financial viability.

Subcontractors will, in most cases, hold a direct subcontract with the Project general contractor, and will, in turn, hold sub-subcontracts with lower-tier subcontractors and material and/or equipment suppliers. The subcontractors will be responsible for managing their own work, as well as the work of their sub-subcontractors, and for ensuring their suppliers’ timely and accurate supply of appropriate materials for the work of improvement to achieve the design intent of the construction documents. Subcontractors are responsible for timely and accurately performing their designated portions of the work, ie, that it meets code requirements and the design. They will be responsible for reworking any portions of their work rejected by the jurisdictional authority or the design professionals should the work not meet code requirements or design intent. Subcontractors can also be responsible for any portions of the project that they “design-build” (ie, HVAC systems, pools, etc).

## 2.4 The Financiers

In most privately owned construction projects, the work is financed through some form of construction loans. Larger project owners can self-finance the work if they chose, but, typically, unless owned by government entities, larger projects will be backed by construction loans. Depending on the nature of the project, these loans can take the form of corporate or public bonds, but, in most cases, a specific lending institution, bank, or other private lender will provide the bulk of the project funding and receive a reciprocal interest in the property from

the owner, along with the promise of repayment with interest. This security interest in the project property is typically in the form of a deed of trust or mortgage.

Depending on the type of loan, the lender may not be involved in the construction process whatsoever, or may be actively involved by periodic inspection of the work and control of payment distributions to the contractor(s). The degree of involvement will be dictated by the construction loan agreement and the construction contract. Companion agreements providing work-continuation guarantees, performance bonds, indemnity or other commitments from the general contractor and key subcontractors for the benefit of the construction lender can be required as part of the construction loan package.

The lender may also require other types of protection from claims for payment and mechanics liens, mentioned above. In Nevada, these may take the form of restrictions against construction commencement prior to recordation of all construction loan documentation, payment bonds, title verifications before release of progress payments, draw inspections, payment-application certifications, project-completion cost projections, and schedule updates as the work proceeds, to ensure the work of improvement will be completed on time and on budget as the project progresses.

## 2.5 The Designer

The design professionals for the typical construction project are usually retained by the Owner, and consist of a lead Architect and sub-consultants, including engineering and other design professionals of specialised disciplines. These professionals are also licensed through Nevada state agencies responsible for governing



the specific professional regulations, education and competency requirements. The Architect will usually lead the design team and be responsible for implementing the Owner's project programme requirements, overall design concept, and coordination of the design and instruments of service, interaction with jurisdictional authorities for design review, revision, code compliance, and permit approval. Typical engineering disciplines will include site/civil, structural, electrical, plumbing and wet utilities, mechanical, and fire/life safety systems. Depending on the Project, other engineers and consultants may be included to meet specific code or governmental mandates, such as access for disabled persons, beverage-delivery systems, kitchen, power plant, exiting, traffic, and other parts of the Work that require unique design.

The design team will directly contract with the Owner in most cases and, after completion of the design documents, will perform certain construction phase services for the Owner as part of the Owner's obligations under the construction contract. These may include periodic inspections of the work to confirm conformity with design intent, preparation of responses to the contractor's requests for information intended to clarify the design instruments of service, making decisions on minor disputes between the Owner and Contractor, and/or similar services.

Design professionals are also entitled to payment security by way of mechanics lien in Nevada. They also typically retain ownership in their design work as intellectual property and are not able to transfer ownership rights to the Owner or any other third party. Instead, they provide a license right for use the intellectual property to the project owner by operation of contract.

## 3. Works

### 3.1 Scope

The scope of a work of improvement in Nevada is a negotiated process involving the design created by the design team, implementing the Owner's project programme or "vision" for the Project. It is the design team's responsibility to achieve the Owner's vision of the Project's appearance, performance, operation and ongoing maintenance. The design, once finally approved by the jurisdictional authorities, will consist of various "instruments of service", including dimensional plans, drawings, schematics and instructional text in the form of design notes and specification books. Depending on the specific type of project and its intended use, these documents may have different titles and abbreviations.

Typical construction contracts will specifically include the entire design instruments of service and expandatory language to ensure that omissions from design that are necessary to achieve design intent are included in the general contractor's scope of work. This can be a source of dispute in the negotiation process, as well as in the construction phase when the scope of work contract provisions is not well prepared. These disputes will usually arise in the form of change orders to the construction contract.

### 3.2 Variations

"Variations" or "changes" come in several forms. Depending on the contract language, they can be referred to by various names, including "Change Order", "Request for Change Order", "Change Order Request", "Construction Change Directive", "Architect Special Instructions", "Owner Requested Change", "Contractor Requested Change," "Modification", or other nomenclature (and their abbreviations) that at times seems as unique as the project. Regardless of the chosen

term for such variations, they seek (or create) a revision of the contractual terms in some fashion. Depending on their scope and cost, they can and will affect both the actual work performed by the contractor and the price the contractor will be paid to complete the work as changed.

Change Orders will usually be categorised according to the party requesting the change and the reason for which the change is necessary. In general, changes are made to the design (whether required by the Owner or driven by involvement of the jurisdictional authority, or inaccurate/incomplete design), or to field conditions. Sometimes, such changes, or other circumstances, can cause delays or impacts to the work progress. Such delays or impacts are usually addressed by a claim submitted first by the contractor in the form of a change order request, seeking time, additional funds, or both. The failure to approve a contractor-originated change order request will result in a disputed “claim”. Most construction disputes and litigation arise over disputed change orders in one form or another.

In Nevada, a unique set of statutes, referred to as the Nevada Prompt Payment Act (NPPA) (NRS 624.606 through 624.630, inclusive), covers statutory provisions regarding the approval of change order requests submitted by contractors. In general, the statute provides that submission of a change order request to the owner by the general contractor (or by a lower-tiered subcontractor to a higher-tiered contractor with whom they have privity of contract), triggers a 30-day period in which the owner or higher-tiered contractor must affirmatively accept or reject the change order request in writing. Failure to reject the change order in writing within 30 days of receipt will make the requested change order part of the contract by operation of law

– the contractor will be entitled to enforcement of the terms of the change order request as if it were agreed to by all parties. Therefore, when completing a construction project in Nevada, owners and higher-tiered contractors must be diligent to address change order requests on a timely basis on private, non-residential projects.

Residential projects (owned by occupiers of the residence upon which construction is being performed) are not subject to the provisions of the NPPA, including the aforementioned change request provision. Nevada has distinct statutes governing such projects, which provide additional protections to the owner-occupier of a residential project, including requirements that change order requests be signed by the owner-occupier to be enforced, among other things.

### 3.3 Design

As noted above, design for a construction project is divided among professionally licensed design disciplines, such as engineers and architects. Except for licensed contractors who intend to construct their own designs, only professionally licensed design professionals may provide project design intended for construction permitting. The owner’s obligations are limited to conceptual ideas and operational requirements, which the design professionals must implement through their instruments of service.

Contractors may contribute to the design process by providing preconstruction services (such as preliminary cost estimates and value engineering) or, in unique disciplines (such as fire/life safety), will provide their own designs for inclusion in the design instruments of service. As noted above, there can be numerous consultants providing design input, but design teams most typically include individuals or firms specialising in Architectural, Site/Civil, Plumb-

ing, Electrical, Mechanical, and Fire/Life Safety disciplines.

### 3.4 Construction

As noted above, construction is divided between the general contractor and multiple trade subcontractors that hold the requisite licences to perform the various parts of the construction process necessary to achieve design intent. If construction of a design requires more than two unrelated trade subcontractors to complete, a general contractor must be hired by the owner to complete the construction. Importantly, while a general contractor can perform most trade-specific work on a construction project, they may only self-perform plumbing, electrical, refrigeration, or life safety work if they hold the specific Type C trade licence for that discipline in addition to their Type A or Type B licence. Otherwise, the general contractor must hire a trade contractor holding the Type C licence required to perform those portions of the construction.

### 3.5 Site

The general contractor is typically responsible for the construction site, throughout the course of construction. This responsibility is imposed both by contractual provisions and regulations imposed on the party who “pulls” the construction permit for the project. This responsibility includes all aspects of the site that exist and are unknown (geotechnical conditions, archaeological finds, underground obstacles, etc), as well as those imposed through the course of construction, such as pollution, site safety, vandalism, etc. However, provisions are often included in construction contracts to transfer this risk back to the Owner when such site-related issues are found.

In general, however, if there is no specific contractual provision governing discovery of an

unknown site condition, the party charged with responsibility depends on the type of condition found. In Type 1, differing site condition cases, the site conditions are unknown to exist on the particular construction site at the time the construction contract is executed but are (or should be) expected by contractors with experience in the local area. In Type 2, differing site conditions cases, the site conditions are both unknown and unexpected by contractors with experience in the local area. Typically, resolution of Type 1 conditions is the responsibility of the contractor and resolution of Type 2 conditions is the responsibility of the owner. However, if the contractor endeavours to resolve a Type 2 condition without providing notice to the owner of the condition and without requesting direction for resolution, the contractor can be held responsible for the resolution. In the case of archaeological finds, grave sites, endangered species and other types of conditions, federal and/or state law may apply and provide specific methods of resolution for such site conditions to avoid liability.

### 3.6 Permits

Whether or not a specific work of improvement, or a specific part of a larger work of improvement, requires the issuance of a construction permit is a matter of local code and ordinance. The need for a permit or the lack of a need for a permit can be surprising. For instance, in some Nevada jurisdictions, replacing an existing water heater with a new one requires a permit, but the pouring of a concrete driveway will not. Whether a specific project needs a permit, however, must be determined and addressed before work commences to avoid adverse action by jurisdictional authorities.

The general contractor will be responsible for pulling the permit if one is needed. The design professional team is responsible for applying for

permits and obtaining approval of the permit, so work can commence after the contractor receives it and accepts responsibility for compliance with its requirements. After a general construction permit is obtained, specific subcontract disciplinary permits may also be required. These can come from other governmental agencies than the jurisdictional building departments, such as the fire department, the health district, etc, depending on the Project use. The general contractor is expected to coordinate all required permits for the work.

### 3.7 Maintenance

Except in unusual circumstances, once a construction project achieves completion it is turned over to the Owner for use and occupancy. All maintenance of the facility will revert to the Owner and the contractor is released from continued maintenance beyond its contractual obligations. In limited cases, statutory obligations can require the contractor to guarantee performance of their workmanship for certain periods of limitation, but such obligations do not extend to ordinary maintenance required for the work, or normal issues caused by expected occupancy wear and tear. Any obligation to provide such ordinary use maintenance is a contractual obligation beyond the typical construction contract.

### 3.8 Other Functions

Other functions between the owner and the contractor are not typical, and would be considered only in specific contractual circumstances, governed by the kind of project and the needs of the Owner.

### 3.9 Tests

Testing of systems and operations of the work of improvement are handled by the general contractor and specific disciplinary subcontractors, with applicable jurisdictional authority inspec-

tors. These tests and confirmations must be passed to obtain permission to complete follow-up work, or final certificates of occupancy or certificates of completion for continuance of construction when necessary for the Project's occupancy and use. Failure to pass such tests will require that the work be stopped or will prevent use of the project until repairs are made.

### 3.10 Completion, Takeover and Delivery

In most cases, Nevada will follow a typical process of completion that begins after substantial completion is achieved. Substantial completion can be specifically defined by contract, but generally it is understood to be when a project is sufficiently complete that the owner may use it for its intended purpose, even if there remains construction work to complete. Substantial completion can be accompanied by the issuance of a temporary certificate of occupancy, which allows the owner to begin certain functions of takeover while final inspection and testing is being completed by the contractor.

Usually, when a contractor believes they have achieved substantial completion of the Project, there is a job walk performed to create a "punch list" of remaining issues that must be completed by the contractor before the architect and/or the owner will accept the project as complete. Once this punch list is agreed upon, the contractor completes the punch list within a specified period. Payment of contractually withheld retention can be made after substantial completion is achieved, but, in most cases, will not be released in total until final completion and acceptance has occurred. Specific requirements to achieve final completion are set out in the contractual agreement.

### 3.11 Defects and Defects Liability Period

Pursuant to the provisions of NRS 11.202, the statute of limitations for injuries caused by deficiency in the design or construction of a work of improvement is 10 years after substantial completion of that work of improvement, which is uniquely defined. In general, if the work has not achieved substantial completion as defined for this purpose, a claim for construction defect cannot arise, but would be actionable by either breach of contract or negligence. In a residential structure, as opposed to a commercial structure, a claim for construction defect is handled through unique statutory provisions found in NRS 40.600 through 40.770, inclusive. Such provisions and details are beyond the scope of this guide, but unique remedies and procedures (as well as indemnity and insurance requirements) are available to residential homeowners within these provisions that do not apply to commercial project owners. Commercial project owners are limited to claims arising from their contracts and provisions therein, with the courts generally finding that such contracts are better suited to distribute risks of deficient construction and the results thereof.

## 4. Price

### 4.1 Contract Price

Payment methods and methods for determining the contract price vary greatly in Nevada. Smaller construction projects are delivered usually on lump sum or fixed price amounts, based on an estimate against a completed design. This “Design-Bid-Build” delivery method relies on a completed and coordinated design, and competent estimating system. Most public works projects are competitively bid using this method. In the private works sector, this method is also often used, followed by a session of negotia-

tions with the leading general contractor over the final contract price. Such negotiations are not allowed in the public works context on competitively bid projects.

The next most commonly used process in private works construction is the use of a cost of the work plus a fee, usually accompanied by a guaranteed maximum price that the Contractor will not exceed, absent approved change orders. This “Cost Plus with a GMP” delivery method also often will include preconstruction services by the selected contractor (here called a “Construction Manager at Risk” (CMAR)) during the construction document preparation stage of design. The fee is the percentage markup the CMAR negotiates to add to the actual cost of the work incurred during the construction process. Through the course of the preconstruction phase, the contractor estimates the maximum cost the completed design. Once the contract is signed, the contractor expects the completed design to conform to that stated design intent, so it can keep construction costs within the GMP maximum price. Often, incentives such as shared-savings clauses are used to incentivise the general contractor to stay below the GMP. If design changes cause the GMP to be exceeded, the general contractor will seek a change order to increase that GMP amount.

Sometimes, contractors will use a variation on the Cost-Plus concept without a GMP. This is also known as “Time and Material” or T&M. In this method, the general contractor prices the construction work on the actual cost of material and the actual cost of labour over the amount of time the work takes, and then adds a mark-up for overhead and profit. Many change orders are performed based on this principle.

## 4.2 Indexation

Indexation or price fluctuations occur when commodity prices impact the cost of raw materials, such as copper, lumber, fuel, and even labour. These fluctuations can have substantial impacts on contractors performing contracts on a lump-sum basis, or contracts with a guaranteed maximum price. If price fluctuations are a concern, construction contracts are drafted with price-escalation provisions that link commodity-based materials to specific time indexes that allow for increases at certain levels should raw materials costs increase or decrease. Alternatively, owners may fund larger purchases of materials at earlier times to avoid such fluctuations. Such circumstances are routinely handled through contract negotiation phases, and are not routinely addressed by statute or regulation, except for specific public works projects such as transportation projects with long-term schedules for completion.

## 4.3 Payment

Like almost all aspects of Nevada construction, the rights and responsibilities for payment are governed by the construction contract terms. Payments and the components of a completed payment application are governed by the contract terms and the lender (if any) requirements for progress draw release. Because of the aspect of mechanics lien claims, statutory Mechanic's Lien payment waiver and release forms are specified to induce payment at certain intervals. These waiver and release forms are found at NRS 108.2457(5), and come in four specific forms for specific purposes, as follows:

- Conditional Waiver and Release upon Progress Payment;
- Unconditional Waiver and Release upon Progress Payment;

- Conditional Waiver and Release upon Final Payment; and
- Unconditional Waiver and Release upon Final Payment.

All of these release forms, however, are conditioned on receipt of payment specified, regardless of their language. See NRS 108.2457(2) and cf. NRS 108.2457(5)(e).

The NPPA, discussed in 3.2 Variations, also impacts payment on construction projects. In addition to the impacts previously covered regarding variations and change orders, the NPPA also governs when payment must be made and what remedies are available to a contractor in the event of non-payment. Generally, the NPPA requires payment to be made on or before the date that payment is specified to be due in written contract. When no written schedule of payments exists in a written contract, an owner must make payment to a general contractor within 21 days of presenting an invoice. A subcontractor must be paid within 30 days of its presenting an invoice to a higher-tiered contractor. The owner or higher-tier contractor must either pay the invoice by the date specified in the contract or statute or provide written notice of intent to withhold funds. Funds may only be held for certain reasons and in certain amounts.

If the notice of withholding is not provided and payment is not made on a timely basis, the contractor expecting payment may stop work on the project, after giving written notice of its intention to do so. If payment is still not made after the contractor stops work, the contractor may provide additional written notice of its intention to terminate the contract, and then do so. Upon such termination, the contractor may seek to recover what payment is actually due under

its contract, plus reasonably incurred attorneys' fees and costs.

General contractors often include pay-when-paid or pay-if-paid clauses in their subcontracts with lower-tiered contractors, to avoid responsibility for payment to their subcontractors before they have been paid by the owner for the subcontractor's work. The NPPA arguably supports the enforceability of a pay-if-paid and/or pay-when-paid contractual provision. Case law interpreting the NPPA, however, has not been clear about when and under what circumstances such contract clauses may be enforced.

Final payments, in the form of released withheld retention, are received after actual completion and provision of all turnover requirements.

## 4.4 Invoicing

Somewhat related to the discussion of payments in 4.3 **Payment**, invoicing is an issue reserved in contractual terms between the contracting parties. There is no express or standardised form for invoicing or payment applications, and each project is different. Actual forms provided by various standardised form services, such as the AIA Contract forms, are often used in lieu of party generated forms. Construction project lenders sometimes require specific forms, such as the AIA forms, which include certifications by the invoicing party of the accuracy of the construction progress described in the invoice.

Invoices are accompanied by Conditional/Unconditional waiver and release forms also discussed in 4.3 **Payment**. Specific contractor requirements beyond these are contractually generated and must be reviewed to ensure compliance.

## 5. Time

### 5.1 Planning and Programme

The planning, sequencing, and scheduling of the various activities making up a construction schedule are handled by the General Contractor on the Project. As with most United States jurisdictions, a general contractor is responsible for the means and methods of putting together a given construction project, and the project Owner is prohibited from interfering with those means and methods. An owner's interference with the construction scheduling can lead to claims for delay, disruption, constructive acceleration and/or other impacts, or, in extreme cases, claims of owner abandonment of the entire construction project contract.

Construction scheduling is a matter of theoretical concept in many respects, and there are different methods for doing so, with computer programmes to assist readily available. The most commonly used method in commercial construction is the critical path method schedule (CPM), where the sequence of activities is linked by computer code in a logical sequence, beginning from preconstruction activities through final inspections and close-out. The longest sequence of activities provides the project's "critical path", and time-based claims are evaluated against that critical path and impacts thereon. Such scheduling is preferred by most courts in the United States when evaluating time-based claims for damages arising from construction projects. However, the use of alternative methods does not preclude such claims.

Smaller projects can use bar graphs, or even calendars written by hand. Regardless, the sequence of the activities is set out in a natural sequence that allows for the timely completion of activities necessarily predecessors to later

activities, which are predecessor to still later activities and so forth, through completion.

Critical path scheduling is not the exclusive basis for scheduling a project and simply contractual scheduling can be enforced successfully.

## 5.2 Delays

The occurrence of delays does not always result in a claim. For instance, construction-project schedules created by CPM naturally have a certain amount of extra time (referred to as “float”) around most activities. “Float” in this instance is thought of as a time commodity on a construction project, which can be used by any party who needs it until that particular activity becomes “critical” – that is, becomes the next activity in the longest sequence of activities that must be performed to deliver the project on schedule. Once an activity becomes “critical”, the party causing delay to the activity incurs liability for the delay, unless an exception exists.

Exceptions for delay liability are generally found in the causal source of the delay, or the fact that other critical activities are simultaneously impacting the critical path, and thereby excuse delaying activities that are concurrent.

Calculation of time-based damages are best understood as additional costs for the time expended unnecessarily during the delay, as well as inefficiencies in productivity. Additional costs can be in categories of lost revenue or additional expenses in the case of an owner, or in the case of a contractor’s additional expenses in general conditions, increased material costs and inefficient labour productivities.

Delays and their cause are an issue of theoretical science in many cases, usually falling within the parlance of expert testimony and analysis, which

is therefore required in most cases through the litigation process. The type of analysis used to calculate delays and resulting claims is dependent upon the type of scheduling method used during the construction project. The analysis is also affected by relevant contract provisions.

## 5.3 Remedies in the Event of Delays

Remedies for delay often depend on contractual waivers or limitations, occasionally impacted by statutory prohibitions on such clauses. In Nevada, a “no damage for delay” clause is limited by application of NRS 108.2453 provisions to circumstances that are contemplated by the parties, that are reasonable under the circumstances to the contractor, or for which the contractor is responsible. So long as the rights conferred to a contractor under NRS Chapter 108 are not affected, Nevada courts enforce “no damage for delay” clauses. See, for example, *J.A. Jones Constr. Co. v Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 285 (2004).

On the owner’s side, it is routine for consequential damages arising from delay to be waived. Such damages are usually lost revenue, lost use, increased financing costs, and so on.

## 5.4 Extension of Time

Time extensions are usually driven by some other event that may cause the work to be delayed or cost more than contemplated – eg, an owner change of design, or an unforeseen condition or impact. In most cases, the request for additional time will be included in a change order request and supported by a time impact analysis. In CPM scheduling, time impact analyses may require compartmentalised fragment-of-schedule sequencing analysis, or “fragnet”, that shows how a particular event impacts the overall schedule critical path. Once again, in most CPM cases, the availability of project “float” and the



determination of liability for the extension cause will need to be analysed by expert testimony.

## 5.5 Force Majeure

Nevada has no mandatory or statutory prohibition of waiver or enforcement other than as contractually specified or restricted under the same provisions impacting delay claims. A force majeure clause will be enforced as written in the State and will be limited to its listed circumstances.

## 5.6 Unforeseen Circumstances

In general, unforeseen circumstances giving rise to impacts are not protected for an owner's interests. As noted, NRS 108.2453(2)(e) provides protection to a contractor who incurs damages for time and money from events that were "not contemplated by the parties" at the time of contracting. As such, contractual provisions shifting risk of such actions to the contractor or waiving rights for unforeseen conditions are potentially void and unenforceable.

## 5.7 Disruption

Disruption to the contractor's planned means and methods of construction or schedule can be a cause of recoverable damage, if such disruptions are caused by circumstances outside the control of the contractor, and, in most cases, impact the critical path of the construction schedule. Damages for such disruptions would be measured based on time extensions to the construction sequence, as well as the increased costs to the construction and lost productivity caused by the disruptive events and impacts.

## 6. Liability

### 6.1 Exclusion of Liability

Within the context of construction, the non-waivable liabilities are fairly limited in Nevada. Certain types of waivers are restricted as violative of public policy, and primarily surround purported contractual waivers of obligations and liabilities imposed on contractors that limit their options to recovery payment for their work.

NRS 108.2453 provides certain limitations on waivers of rights within a construction contract that relate to the Mechanic's Lien. Specifically, under subsection 1, "a person may not waive or modify a right, obligation or liability" that is provided under the Nevada Mechanic's Lien (NRS 108.221 through 108.246, inclusive). As such, except as specifically addressed in NRS 108.2457, the Mechanic's Lien provisions may not be waived or limited and the owner's obligations under those provisions may not be waived or modified. In addition, specific provisions are prohibited under NRS 108.2453(2), which include the following:

- requiring a lien claimant to waive or limit rights afforded lien claimants;
- relieving a person from obligations or liabilities under the Nevada Lien law;
- making a Nevada construction contract subject to the laws of another state;
- requiring venue for dispute resolution on a Nevada located project to occur in another state, and
- requiring a contractor to enter into a waiver of delay or other impact damages under certain circumstances.

Additionally, under the NPPA, contractual provisions that waive or limit the rights of lien claimants to receive the benefits, or relieve the owner

or higher tiered contractors from obligations and liabilities under the NPPA, are also void and unenforceable as against public policy. See NRS 624.622(2), and *cf.* NRS 624.628(3).

## 6.2 Wilful Misconduct and Gross Negligence

No Nevada case law or statutory prohibitions forbid or allow the exclusion or limited liability for gross negligence or wilful misconduct in the context of a contractor in the act of construction. However, based on various decisions and comments of the Court, it could be surmised that Nevada courts would not accept an exclusion of liability for a person's own wilful misconduct.

Neither wilful misconduct nor gross negligence is statutorily defined in relation to the public, but the concepts are recognised by statute and carry different and specific consequences when so raised. Under case law, the Court provides some definition and recognises a distinction between "ordinary negligence" and "gross negligence" as an issue of degree, and distinguishes both from "wilful misconduct." As it stated in 1979:

*"This court has consistently distinguished the concepts of ordinary or gross negligence from the concepts of willful or wanton misconduct. Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a [willful] and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from [willful] and intentional conduct which is or ought to be known to have a tendency to injure."*

*Davies v Butler*, 95 Nev. 763, 771, 602 P.2d 605, 610 (1979) (citing *Hart v Kline*, 61 Nev. 96, 101,

116 P.2d 672, 674 (1941)). In *Hart*, the Court adopted a definition of gross negligence from another jurisdiction:

*"Gross negligence is substantially and appreciably higher in magnitude and more culpable than ordinary negligence. Gross negligence is equivalent to the failure to exercise even a slight degree of care. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others. The element of culpability which characterizes all negligence is, in gross negligence, magnified to a higher degree as compared with that present in ordinary negligence. Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from willful and intentional conduct which is or ought to be known to have a tendency to injure."*

*Hart v Kline*, 61 Nev. 96, 116 P.2d 672, 674 (1941) (citations omitted).

## 6.3 Limitation of Liability

As previously discussed, Nevada will, where there are no public policy prohibitions, enforce most contractual provisions between corporate actors. Contractual provisions with consumers can be subject to arguments of adhesive

or unconscionable contractual provisions and unequal bargaining power. There are no specific cases or statutes prohibiting a limitation of liability within the context of construction between commercial ventures, however, and contractual provisions limiting liability are not generally understood to be contracts of adhesion or unconscionable restrictions in the commercial context. So long as such limitations are not seen as creating exculpatory release from an actor's own bad faith, gross negligence or wilful and immoral conduct, it is not likely that express liability limitations could be deemed unenforceable.

## 7. Risk, Insurance and Securities

### 7.1 Indemnities

Nevada generally will enforce any type of indemnity provision, whether indemnifying a person for the indemnitor's actions only ("Type 3"), when the indemnitor is contributorily negligent with the indemnitee ("Type 2"), or even if the indemnitee is solely negligent ("Type 1"), as Nevada has not enacted any anti-indemnity statutes to date. Of late, however, the Court has begun construing indemnification clauses more strictly and placing specific language requirements on these clauses. In *George L. Brown Ins. v Star Ins. Co.*, 237 P.3d 92, 126 Nev. 316 (Nev. 2010), the Court placed specific limits on the language of a Type 1 indemnity agreement in order to make that obligation enforceable. Specifically, the Court requires a Type 1 indemnity provision to specifically state that the indemnitor is indemnifying the indemnitee from its own negligence to be enforceable. The Court stated:

*"[A]n express or explicit reference to the indemnitee's own negligence is required to indemnify an indemnitee for his or her own negligence*

*because "the character of [such an] indemnity [is] so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation, and no inference from words of general import can establish it."*

The Court expressly rejected the "modern minority rule" which allowed general statements such as "any and all claims" standing alone to be sufficient to establish Type 1 indemnity obligations.

In *Reyburn Lawn & Landscape v Plaster Dev. Co., Inc.*, 127 Nev. 331, 255 P.3d 268 (2011), the Nevada Supreme Court extended this "expressly or explicitly provided" test to Type 2 indemnity provisions, ie, those indemnity provisions allowing for complete indemnification of the indemnitee, even in the circumstance of contributory negligence of the indemnitee. The Court noted that, just as in Type 1 sole indemnity obligations under *Brown Insurance*, an indemnification clause must explicitly or expressly state that the indemnitor will indemnify the indemnitee for the indemnitee's contributory negligence. A general statement of indemnity will not suffice.

In 2012, the Court extended the *Reyburn* decision, finding that the use of the limiting language "to the extent caused in whole or in part by" the indemnitor, in a contractual indemnity provision will require (both for indemnity and defence) that causation by the indemnitor be shown before an obligation to indemnify and defend arises. *United Rentals v WellsCargo*, 128 Nev. 666, 289 P.3d 221 (2012). This applies to both sole and contributory negligent situations. Further, the Court noted that the contractual indemnity language would be strictly construed to impose indemnity obligations, and that the naming of the indemnitee as an additional insured under any

applicable insurance policy would not alter the outcome when the indemnity provision uses the “to the extent caused by” language.

Given these factors, the Court seems intent on limiting the reach of general indemnity provisions. As such, the safest approach is to spell out, as specifically as possible, the reach of an indemnification clause.

It should also be noted that, in the context of residential construction defect litigation, the Nevada legislature enacted NRS 40.693, which effectively limited indemnity obligations of subcontractors to general contractors to Type 3 indemnity obligations and imposed significant restrictions on wrap insurance coverage policy requirements. These restrictions should be carefully considered when negotiating subcontract agreements for new residential construction projects.

## 7.2 Guarantees

There are few mandatory warranties that apply to construction projects within Nevada. However, unconscionable contracts or provisions when made can be challenged on that basis. Implied warranties of fitness for particular purpose and of merchantability will apply to goods and products which some case law in Nevada would consider residential structures when newly constructed. Disclaimers of such warranties have not been effective.

In general, residential projects are considered “defective” when, as a whole or in their component parts, their design, construction, manufacture or repair (including landscaping) presents “an unreasonable risk of injury to a person or property or are not completed in a good and workmanlike manner” and cause injury or damage. See NRS 40.615. This definition would

arguably not directly apply to a commercial structure, although, in that context, the warranty or guarantees would more likely be specified in the contractual agreements for their construction. Nevada courts would likely enforce those provisions in a commercial context.

## 7.3 Insurance

Typically, insurance policies within the construction context are those found in other commercial endeavours. General Commercial Liability insurance coverage for operations, Completed Operations Coverage, Automobile and Equipment Coverages, Workers Compensation and Umbrella liability coverage policies are routinely requested and expected. Per occurrence and aggregate policy limits are determined based on contractual limits and potential liability for the construction activities and their relative levels of danger.

Additional coverage is often provided based on risk tolerance of the parties during the contract negotiation phases. Builders Risk coverage for damages to in-progress work is routine on larger projects. Wrap insurance programmes on a Project basis are often used for their consistency of coverage and economic incentives to the Project funding mechanism.

Concerns on all policies are any dwindling and depreciating limits on policies for other projects which would also be covered by a contractor’s insurance limits. Nevada has recently passed restrictions on such depreciating limits for costs of defence and attorneys’ fees in the context of certain types of claims. Riders to cover such expenses outside the limits of the policy coverages should be considered.

## 7.4 Insolvency

State law in Nevada does not impact construction contract clauses, making filings for protection under United State Bankruptcy laws or state receivership laws cause for default, and does not distinguish between parties in that context. However, caution must be exercised before attempting to enforce such provisions when a party has filed for protection under United States Bankruptcy law. In such cases, under 11 USC § 362, an automatic stay of any adverse action against the bankrupt entity is prohibited and subjects the action-taker to court sanctions, including fines. While notices to secure contractual rights may be issued and certain preliminary steps taken to secure the non-bankrupt party's rights, no specific adverse action may be undertaken without lawful order of the presiding Bankruptcy Judge. Before taking any action, a local practitioner in United States Bankruptcy law with experience in handling construction matters in that particular context should be consulted.

## 7.5 Risk Sharing

In Nevada, risk-sharing contracts and provisions have not gained much traction in the construction industry. The more traditional methods of passing risk of loss and liability through contract provision and indemnity obligations, insurance, surety bonds, and other mechanisms remain the preferred options. Modern risk-sharing delivery methods, such as Integrated Project Delivery and other options, have not seen much traction in the local construction industry, with Construction Management and Design Build concepts significantly preferred as risk lowering options.

## 8. Contract Administration and Claims

### 8.1 Personnel

Construction contracts dealing with personnel are usually limited to provisions establishing acceptable cost levels for personnel passed along to the Project owner in cost-plus contract options, or not disclosed beyond general conditions schedules of values for labour and labour-burden rates. Contractual provisions requiring superintendents to be able to understand and speak the English language, to remain on site daily or weekly, and to maintain control over their labourers' and their own conduct, are routine. Contractual obligations to remove certain managerial or supervising personnel at the owner's reasonable request are also routine.

On public projects and commercial projects subject to union contracting labour agreements, obligations for conforming to applicable prevailing wage laws, project labour agreements and/or union labour agreements are also routine.

### 8.2 Subcontracting

Typical provisions regarding subcontracting in construction contracts will allow subcontracting portions of the work to properly licensed subcontractors who perform the assigned tasks for the general contractor. Prohibitions of assignment of the entire contract from one general contractor to another are mostly prohibited.

### 8.3 Intellectual Property

In most construction contracts dealing with intellectual property rights, general contractors are required to indemnify, defend and hold owners harmless from violations of intellectual property rights of third parties violated as part of the contractors' work, means and methods of construction. Intellectual property rights of

design professionals in their design concepts and instruments of service are reserved to the design professionals under applicable Nevada state law, and only licensing of the right to use such intellectual property in the construction of the design are allowed, without further authorization of the design professional holding such rights.

## 9. Remedies and Damages

### 9.1 Remedies

Remedies available within Nevada are mostly contract based, with limited exceptions in the context of payment and performance rights.

In the context of public works construction, public owners are limited in their remedies to breach of contract remedies as well as enforcement of performance surety bond obligations, which ensure the project will be completed on a timely basis and at the cost agreed with the Contractor. A contractor's right to payment is only protected by the contractual right against the public entity contracting for the work. However, statutory rights to enforce payment by petition to the courts on an expedited basis, as well as the payment of interests on past-due funds, is available. For subcontractors and suppliers to the third tier only, payment is also protected by the availability of a payment surety bond, and prompt payment remedies.

On public projects, Nevada law does not provide significant protections to an owner of the project beyond its contract and claims on surety bonds of limited liability to ensure compliance with the Nevada Contractors License laws, found at NRS Chapter 624. However, on private projects, Contractors, subcontractors and suppliers have, in addition to their contractual rights, a right to

assert and enforce a Mechanic's Lien right to sell the owner's property and recover payment. Contractors on private projects also have rights under the NPPA, discussed previously herein, to stop work and terminate a contract early for lack of timely payment.

### 9.2 Restricting Remedies

Outside of the design professional context, it is unusual for limitations on damages to be used in construction contracts. In contracts with design professionals, liability is often limited to the total value of the design contract, which is often substantially less than the value of a construction contract. Enforceability of such damage limitations in design contracts has not been judicially tested in any reported case decisions in Nevada. Waivers and limits on the rights of mechanics liens or rights afforded to contractors under the NPPA are generally prohibited by statute.

### 9.3 Sole Remedy Clauses

Within the context of design professional contracts, it is not unusual to see provisions limiting the liability of individual licensed professionals to that of the corporate entity out of which they operate. Such provisions, however, are likely not enforceable as the entities can only operate in Nevada through the licence of the individual professional.

### 9.4 Excluded Damages

In general, many types of damages may be restricted by contract, unless statutorily prohibited or prohibited through public policy declarations. Most often, consequential damages are waived via contractual provision. For contractors, however, the waiver of consequential damages is limited by certain provisions of NRS 108.2453(2)(e) in the context of delay, disruption, and other kinds of time-impact damages.

## 9.5 Retention and Suspension Rights

Retention is authorised by statutory provision, not to exceed five percent (5%) of the payment amount made, except with specific notice provisions and in specific circumstances.

Likewise, Contractors have specific rights to suspend performance in the event of late or non-payment under the NPPA.

Owners retain the right to withhold payment for specific items and contexts under the NPPA. They also may suspend work when contractual provisions allow for such suspension.

## 9.6 Termination

Contractors maintain a statutory right for termination of a construction contract for continued lack of timely payment, upon certain notice requirements under the NPPA (see **3.2 Variations**). Owners similarly may terminate a construction contract under the NPPA when a dispute leads to the Contractors work stoppage. Otherwise, termination is usually handled through contractual provision, which typically allow for termination for cause/default of the contractor, and for the owner's convenience. Such contractual provisions are not routinely provided to the Contractor, except for non-payment issues.

## 10. Dispute Resolution

### 10.1 Regular Dispute Resolution

Nevada trial courts are divided by dispute value, depending on the jurisdiction. In Clark County, Nevada (where Las Vegas is located), disputes under USD15,000 in value are handled by the Nevada Justice Court system and its divisions and disputes over USD15,000 are handled by the Nevada District Court System. The District Courts are also charged with evaluation of title to real property and are therefore appropriate venue for mechanics lien disputes, regardless of the value of the dispute. In smaller jurisdictions, such as those located in Carson City or Lyon County, the division amount between these courts is less, typically USD10,000.

### 10.2 Alternative Dispute Resolution

Nevada construction projects routinely use alternative dispute resolution mechanisms to resolve construction disputes. Mediation, arbitration and dispute resolution boards are typically seen as workable alternatives, when negotiation fails to resolve disputes. Nevada statutorily regulates arbitration by provisions found in NRS Chapter 38. Form construction contracts often contain arbitration clauses mandating that arbitration be conducted by specific forums, such as the American Arbitration Association, which can result in higher costs than other alternatives.

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