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# **SUMMARY OF NEVADA CONTRACTORS LICENSE BOND LAW**



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## THE LAW:

Nevada contractor license bonds are mandated by the Nevada legislature for most contractors. NRS 624.270 reads in relevant parts:

NRS 624.270 Bond and deposit: Requirements; amount; conditions.

1. Before issuing a contractor's license to any applicant, the Board shall require that the applicant:

(a) File with the Board a surety bond in a form acceptable to the Board executed by the contractor as principal with a corporation authorized to transact surety business in the State of Nevada as surety; or

(b) In lieu of such a bond, establish with the Board a cash deposit as provided in this section.

5. After a licensee has acted in the capacity of a licensed contractor in the State of Nevada for not less than 5 consecutive years, the Board may relieve the licensee of the requirement of filing a bond or establishing a cash deposit if evidence supporting such relief is presented to the Board. The Board may at any time thereafter require the licensee to file a new bond or establish a new cash deposit as provided in subsection 4:

(a) If evidence is presented to the Board supporting this requirement;

(b) Pursuant to subsection 6, after notification of a final written decision by the Labor Commissioner; or

(c) Pursuant to subsection 7. If a licensee is relieved of the requirement of establishing a cash deposit, the deposit may be withdrawn 2 years after such relief is granted, if there is no outstanding claim against it.

NRS 624.273 delineates who can make claims against the bonds, the limits of such claims, and the rights and duties of the surety issuing the bond.

NRS 624.273 Bond and deposit: Person benefited; actions; payment by surety without action by court; interpleader by surety or Board; preferred claims; prohibited claims.

1. Each bond or deposit required by NRS 624.270 must be in favor of the State of Nevada for the benefit of any person who:

(a) As owner of the property to be improved entered into a construction contract with the contractor and is damaged by failure of the contractor to perform the contract or to remove liens filed against the property;

(b) As an employee of the contractor performed labor on or about the site of the construction covered by the contract;

(c) As a supplier or materialman furnished materials or equipment for the construction covered by the contract; or

(d) Is injured by any unlawful act or omission of the contractor in the performance of a contract.

2. Any person claiming against the bond or deposit may bring an action in a court of

competent jurisdiction on the bond or against the Board on the deposit for the amount of damage the person has suffered to the extent covered by the bond or deposit. No action may be commenced on the bond or deposit 2 years after the commission of the act on which the action is based. If an action is commenced on the bond, the surety that executed the bond shall notify the Board of the action within 30 days after the date that:

- (a) The surety is served with a complaint and summons; or
- (b) The action is commenced, whichever occurs first.

3. Upon receiving a request from a person for whose benefit a bond or deposit is required, the Board shall notify the person that:

- (a) A bond is in effect or that a deposit has been made, and the amount of either;
- (b) There is an action against a bond, if that is the case, and the court, the title and number of the action and the amount sought by the plaintiff; and
- (c) There is an action against the Board, if that is the case, and the amount sought by the plaintiff.

4. If a surety, or in the case of a deposit, the Board, desires to make payment without awaiting court action, the amount of the bond or deposit must be reduced to the extent of any payment made by the surety or the Board in good faith under the bond or deposit. Any payment must be based on written claims received by the surety or Board before the court action.

5. The surety or the Board may bring an action for interpleader against all claimants upon the bond or deposit. If an action for interpleader is commenced, the surety or the Board must serve each known claimant and publish notice of the action at least once each week for 2 weeks in a newspaper of general circulation in the county where the contractor has his or her principal place of business. The surety is entitled to deduct its costs of the action, including publication, from its liability under the bond. The Board is entitled to deduct its costs of the action, including attorney's fees and publication, from the deposit.

6. A claim of any employee of the contractor for labor is a preferred claim against a bond or deposit. If any bond or deposit is insufficient to pay all claims for labor in full, the sum recovered must be distributed among all claimants for labor in proportion to the amounts of their respective claims. Partial payment of claims is not full payment, and the claimants may bring actions against the contractor for the unpaid balances.

7. Claims, other than claims for labor, against a bond or deposit have equal priority, except where otherwise provided by law, and if the bond or deposit is insufficient to pay all of those claims in full, they must be paid pro rata. Partial payment of claims is not full payment, and the claimants may bring actions against the contractor for the unpaid balances.

8. The Board may not claim against the bond or deposit required pursuant to NRS 624.270 for the payment of an administrative fine imposed for a violation of the provisions of this chapter.

Claims against the bond are statutory in nature and cannot be made pursuant to common law causes of action, such as breach of contract or negligence.

## WHO IS A PROPER BOND CLAIMANT?

### A. PROPERTY OWNERS (NRS 624.273.1(a))

For a property owner to qualify as a bond claimant, he must have a direct contractual relationship with the principal and must have been damaged by the failure of the principal to *perform the contract or remove liens filed against the property*. While the second prong, removing liens, is self-explanatory, the first one, failure to complete the contract, is open to interpretation, as it appears to include both complete and partial failure to complete the work. It arguably does not include negligent or poor performance of the work.

In Boswell v. Insurance Co. of North America, 85 Nev. 359, 455 P.2d 174 (1969), the Nevada Supreme Court ruled that contractor's surety bonds written as a precondition to licensing of contractor could not be construed to impose liability for negligent or faulty performance of a contractor, and such bond could not be deemed to cover faulty workmanship. More specifically Plaintiffs Boswell hired Metalume to install a roof. The roof leaked. Plaintiffs sued the surety for the cost of repair of defective construction and incident damages. The District Court ruled and Nevada Supreme Court affirmed that "the surety was not liable on its bond for faulty workmanship of the contractor, and entered judgment accordingly." Id. at 360-61.

It is our opinion that the negligent or faulty performance of the contractor does not constitute either an unlawful act or an unlawful omission within the intendment of the licensing statute or the bond written under it. The statutory language has reference to acts or omissions of the contractor which are declared to be unlawful by Ch. 624. Day & Night Manufacturing Co. v. Fidelity & Casualty Co., 85 Nev. 227, 452 P.2d 906 (1969). As we see it, there is nothing in the contractor's licensing statute under which this bond was written designed to guaranty the quality of work performed or materials supplied, nor does the bond itself carry such guaranty. Id.

## **B. EMPLOYEES OF THE CONTRACTOR**

This category obviously applies to laborers and others who work on the construction site and weren't paid partially or in full. It has been extended by the Nevada Supreme Court to union trust funds, which assert claims for unpaid benefits. The claims of the Trustees have priority over all other claims, as do the labor claims in general. Genix Supply Co. v. Board of Trustees, 84 Nev. 246 (1968). NRS 624.273.6.

What about "employees" of the principal, who are supervisors, managers, or part owners? The statute says that the employee must have "performed labor on or about the site of the construction". There is no case law to answer this question, though claimants who had or have an ownership interest in the principal are obviously excluded. Nevada statutes, however, at least indirectly address this issue in the context of the 'prevailing wage' law, which requires that certain employees of a contractor be paid 'prevailing wages' on a public works project. NRS 338.01040 reads:

### **338.040. Workers deemed to be employed on public works.**

1. Except as otherwise provided by specific statute, workers who are:

- (a) Employed at the site of a public work; and
- (b) Necessary in the execution of the contract for the public work,

are deemed to be employed on public works.

2. The Labor Commissioner shall adopt regulations to define the circumstances under which a worker is:

- (a) Employed at the site of a public work; and
- (b) Necessary in the execution of the contract for the public work.

NRS 338.010 in turn defined a “worker” as follows:

22. "Worker" means a skilled mechanic, skilled worker, semiskilled mechanic, semiskilled worker or unskilled worker in the service of a contractor or subcontractor under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed. The term does not include a design professional.

Accordingly, an argument can be made that supervisors and members of management are not proper ‘labor’ claimants. Reference here could be made to the federal Miller Act, where case law has limited the term ‘labor’ to “physical toil but not work by a professional, such as an architect or engineer.” 535 F.Supp. 1155(S.D. Ohio, 1982) Exceptions are made if some physical labor is involved on site.

There is also the issue what is meant by ‘on or about the site of the construction’. The Nevada Supreme Court again addressed this issue in the ‘prevailing wage context, holding that the Phrase "at the site of the work" in this section could include the transportation of materials from a remote location where they were assembled to the main public project construction site; thus, truck drivers transporting materials from one part of the construction site to another, where the materials were immediately incorporated into the project, were entitled to receive prevailing wages. State v. Granite Constr. Co., 118 Nev. 83, 40 P.3d 423, 2002 Nev. LEXIS 9 (2002).

### **C. SUPPLIERS, MATERIALMEN, SUBCONTRACTORS**

The third category of proper bond claimants includes suppliers and materialmen, as well as subcontractors of the bond principal. The last category, subcontractors, is not specifically named in NRS 624.273.1(c) but was added by the Nevada Supreme Court’s decision in Midland Ins. Co. v. Yanke Plumbing & Heating, Inc., 99 Nev. 66, 657 P.2d 1152, 1983 Nev. LEXIS 389 (1983): A subcontractor who, under contracts with general contractor, furnished all materials and labor necessary to complete the labor and finished plumbing for six houses was entitled

to claim against a contractor's licensing bond, pursuant to subdivision 1(c) of this section. Additionally, a supplier need not be aware of the specific contract or project for which the material was supplied. *Balboa Ins. Co. v. Southern Distribs. Corp.*, 101 Nev. 774, 710 P.2d 725, 1985 Nev. LEXIS 504.

Occasionally, design professionals, such as architects and engineers, attempt to assert bond claims as subcontractors of the principal. Such claims should be rejected. (See the discussion above under Employees of the Contractor).

#### **D. PERSONS OR COMPANIES INJURED BY UNLAWFUL ACTS OR OMISSIONS OF THE PRINCIPAL**

This category is typically used by claimants who do not qualify under any of the other three categories. Most often these are general contractors. They generally assert that any civil tort or violation of NRS 624 by the principal qualifies as such an 'unlawful act or omission'. That proposition should be rejected as it would make the other three categories of NRS 624.273.1 meaningless. The Nevada Supreme Court has interpreted this language to apply to claimants who are injured by unlawful acts or omissions of the contractor, declared to be unlawful by NRS 624, the contractor licensing law. *Day & Night Mfg. Co. v. Fidelity & Cas. Co.*, 85 Nev. 227, 452 P.2d 906, 1969 Nev. LEXIS 523 (1969). Specifically, NRS must state that a particular act is unlawful, as it does with regards to some of the following: Engaging in a business in the capacity of a contractor without a license, Nev. Rev. Stat. § 624.700 (2010); unlawful advertising, Nev. Rev. Stat. § 624.720 (2010); taking a contractor's examination for another person, Nev. Rev. Stat. § 624.730 (2010); or acting in a joint venture or combination without an additional license, Nev. Rev. State § 624.740 (2010).

Breach of a contract is not considered an "unlawful act or omission" contemplated under Nev. Rev. Stat. § 624.273(1)(d). However, embezzlement, i.e. receiving payment from the owner or general contractor and then not paying a supplier or subcontractor, would be considered an unlawful act if properly

proven. Vegas Paint Co. v. Travelers Indem. Co., 87 Nev. 46, 482 P.2d 813, 1971 Nev. LEXIS 345 (1971).



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## STATUTE OF LIMITATIONS ISSUES

NRS 624.273.2 states that “[n]o action may be commenced on the bond...2 years after the commission of the act on which the action is based.” While this language appears quite clear, there are nevertheless considerable disputes concerning the interpretation of the term “commission of the act on which the action is based.” We will address this in regards to the different types of claimants.

1. **Property owners.** Property owners will often try to extend the Statute by either claiming that the Statute hasn’t started to run, because the construction project is still incomplete, or by asserting that it was extended because the contractor went back to the project to do some remedial work. The correct position should be that the 2-year Statute began to run either when the contractor walked off the job leaving the project incomplete or didn’t complete the work within the time frame set by the construction contract. In the Payment Bond context, the courts generally draw a distinction between essential work and incidental, repair and warranty work. The latter is insufficient to forestall the running of the limitation period. *T Square Equipment Corp. v. Gregor J. Schaefer Sons*, 272 F. Supp. 962; *Trinity Universal Ins. Co. v. Girdner*, 379 F.2d. 317.
2. **Laborers.** Here, the Statute begins to run when the last work was performed, at least when it comes to unpaid wages. In the union trust fund benefits context, the trust funds often assert a ‘discovery’ claim, i.e. that the Statute begins when the audit is performed and the deficiency is detected. However, a recent Nevada Supreme Court has held that union trusts are ‘in the shoes’ of their labor members, at least in the giving of notice requirements of payment bond claims. Arguably, this holding can be extended to license bond claims also. *Hartford Fire Ins. Co. v. Trs. Of the Constr. Indus. & Laborers Health & Welfare Trust*, 208 P.3d 884.

3. **Suppliers and Subcontractors.** Here the Statute generally starts to run when the last material was supplied or when the last work was done. There are potential exceptions, however. Suppliers and rental or leasing companies sometimes have extended time gaps between deliveries, and under those circumstances one should assert that the earlier deliveries are not covered if outside the Statute of Limitations. The same should be applied to situations where just a two or three large items are delivered or leased, and where there is an extended time gaps between deliveries of these items.

Subcontractors often try to extend the Statute by claiming that they did additional work within the Statute. Here, as previously noted in the Payment Bond context, the courts generally draw a distinction between essential work and incidental, repair and warranty work. The latter is insufficient to forestall the running of the limitation period. *T Square Equipment Corp. v. Gregor J. Schaefer Sons*, 272 F. Supp. 962; *Trinity Universal Ins. Co. v. Girdner*, 379 F.2d. 317.

4. **Wrongful Acts.** This may be the easiest category, at least as it concerns the Statute of Limitation, as the 'act' that starts the Statute to run is obviously the purported 'wrongful act or omission.'

## LICENSE ISSUES

### 1. ARE OUT OF STATE PROJECTS COVERED?

This should be a ‘no brainer’, yet at least one local judge has allowed a claim against the Nevada license bond of a contractor, where the project involved was out-of-state. On the other hand, we were also successful with a motion to dismiss in a case where the construction project at issue was in Wyoming. Here is language from that motion:

NRS 624.273 establishes a scheme whereby four categories of claimants can assert claims against a license bond posted with the Nevada State Contractors Board on behalf of contractors licensed by the State of Nevada. By its very opening language, this statute contemplates that only projects in the State of Nevada are covered: “Each bond or deposit required by NRS 624.270 must be in favor of the State of Nevada for the benefit. . . .”

The previous section, NRS 624.270 requires such bonds before “issuing a contractor’s license for any applicant,” thereby linking the bond directly to the contractor’s license issued by the State. These contractor’s licenses, however, are valid only in the State which issues them, here Nevada. Nevada, in turn, has no jurisdiction at all over construction projects in Wyoming, and if Gunderson worked on the Wyoming project, it could not have legally used its Nevada license there.

The remaining language of NRS 624.273, as well as the language of the bond itself, discuss “contracts,” and Plaintiff’s Complaint appears to assert that because its contract with Gunderson was allegedly entered into in Nevada, a “valid claim against Gunderson’s bond” can therefore be invoked.

That contention, however, completely ignores the intimate link between license and bond – that because the license can only be used in Nevada, the bond itself can cover only Nevada projects.

If Plaintiff's contention were correct, then a contractor could enter into a material delivery contract in Nevada for material to be delivered entirely to California, for example, and could thereafter make a claim against the Nevada bond, thereby making a mockery of all State licensing and license bond statutes.

The purposes of the licenses and the bonds are to protect certain categories of claimants (property owners, laborers, materialmen) who deal with Nevada contractors using Nevada licenses on Nevada construction projects.

In Day & Night Mfg., Co. v. Fidelity & Cas. Co. of New York, 85 Nev. 227, 228, 452 P.2d 906, 907 (1969), the Court wrote: "Chapter 624 is a contractors' licensing statute enacted in the public interest to control and supervise the contracting business in this state." (Emphasis added). At another point, the Court stated: "The material supplier is protected by the lien law of Nevada, NRS ch. 108 and may recover the obligation owing him by resorting to the procedures therein specified." Ibid., at 228.

Obviously, the lien laws of Nevada could not protect the materialman who ships material to Wyoming.

On the other hand, there are some out-of-state cases which allow claims against motor vehicle dealer bonds, where the vehicles were sold outside the state which had issued the license. However, these cases can be distinguished because it is quite foreseeable that vehicles would end up in another state.

## **2. WHAT IF THE LICENSE IS SUSPENDED OR TERMINATED AND THE BOND IS STILL IN EFFECT?**

The last few years many licenses have been suspended or terminated for different reasons without the surety being notified of the suspension or termination, and often the contractor continues to work, causing bond claims to be made. These claims should be denied as the bond is a license bond and as it is therefore intimately bound up with that license. The following are support for that denial:

NRS 624.270 Bond and deposit: Requirements; amount; conditions.

1. Before issuing a contractor's license to any applicant, the Board shall require that the applicant:

a)File with the Board a surety bond in a form acceptable to the Board executed by the contractor as principal with a corporation authorized to transact surety business in the State of Nevada as surety.

“If a principal’s license or permit is revoked or suspended for any reason, the bond will be considered ineffective as of the end of the license or permit period.” 75 U.S. 587 (1869); Cundiff v. Wills, 76 A.2d 55; Rumford v. Boston Grocery Co., 111 Me. 116, 88 A. 395. All these cases hold that the bond goes with the license and remains in effect as long as the license is in effect.

### **3. WHAT IF THE CONTRACTOR HAS MORE THAN ONE LICENSE?**

In Nevada, the State Contractor’s Board has worked out a scheme whereby a contractor can apply for multiple licenses, and there are at least two dozen license categories. The Board in most cases requires the contractor to obtain a different bond for each license, often in different amounts. Accordingly, many claimants will try to make claims against all of a contractor’s bonds, especially if the amount of the claim exceeds the penal sum of the bond for the license which should be at issue. For example, a supplier of plumbing material has a claim for \$20,000.00 but the bond for the plumbing license has only a penal sum of \$2,000.00, while the one for the electrical license has one of \$10,000.00.

Such an attempt should be rejected. Nevada, like California, distinguishes between multiple license categories, but, unlike California, it also provides for bonds to be issued in support of each license category, while California provides for only one bond type.

NRS 624.215 defines the different branches of the contracting business as general engineering, contracting, general building contracting, and specialty contracting.

NRS 624.220 mandates that the State Contractors Board “adopt regulations necessary to effect the classification and subclassification of contractors in a manner consistent with established usage...” and to “limit the field and scope of operations of a licensed contractor by establishing a monetary limit on a contractor’s license. . .”

Acting pursuant to that section, the State Contractors Board indeed adopted such regulations (NAC 624.140 through 624.574) and provided for, among others, more than thirty (30) specialty licenses (C-1 through C-42) with very specific definitions for each such license as to what the licensee can do pursuant to that license.

As stated, Nevada, unlike California, also requires a different bond for each general or specialty license. NRS 624.270 calls for the issuance of surety bonds or cash bonds before the State Board can issue a license to an applicant, and “the amount of each bond. . . must be fixed by the Board with reference to the contractor’s financial and professional responsibility and the magnitude of the contractor’s operations, but must be no less than \$1,000.00 or more than \$500,000.00”. This section also provides that the bond requirement may be waived by the Board, after a licensee has had a license for at least five years. (NRS 624.270.5.)

NRS 624.273 then deals with bond claims, and in its four categories of proper bond claimants it references repeatedly “a construction contract” and “the contract”. The specific language here is crucial. It states that “each bond or deposit required by NRS 624.273 must be in favor of the State of Nevada for the benefit of any person who: **(a) As owner of property to be improved entered into a construction contract with the contractor and is damaged by failure of the contractor to perform the contract... .**” (Emphasis added) The three subsequent categories of bond claimants then reference that construction contract. Presumably, the contractor used only one license for that contract. If more than one license were used, then the bonds in support of such licenses would be at issue.

There is little case law on this subject, and in fact the only cases we are aware of are from Arizona, Wright v. U.S. Fidelity, 601 P.2d 1356, and Watson v. Welton, 563 P.2d 331. In Wright, a supplier of air conditioning material sued a surety to recover bonds the surety had issued for four different contracting licenses as follows:

1.	C-39 Air Conditioning	\$7,500.00
2.	C-4 Boilers, Steamfitting and Processed Piping	1,000.00
3.	C-58 Warm-air Heating, Ventilating, Evaporative Cooling	7,500.00
4.	B-General Building, Heavy Construction	3,000.00
5.	C-45 General Sheet Metal	1,000.00

The trial judge granted summary judgment to the claimants on all bonds, and the surety appealed. The Arizona Court of Appeals reversed with the following language:

We hold that the trial court erred. In Watson v. Welton, 115 Ariz. 76, 563 P.2d 331 (App.1977), this Court analyzed the licensing and bonding scheme contemplated by A.R.S. s 32-1152 and concluded that in multiple-licensing situations, the surety's liability on the supporting bonds was limited to the contractor's failure to perform a contract under the license for which the bond was issued. While the facts in Watson are distinguishable, the legal analysis is not. Here each bond clearly identified the license and contracting classification for which it was issued. Those for whose benefit bonds were required in connection with the contractor's C-39 (Air Conditioning) and C-58 (Warm-air Heating, Ventilation) contracts received the full benefit of those bonds.[FN3] Given the statutory scheme evidenced by s 32-1152's requirement of separate bonds in varying amounts depending upon the contracting classifications involved, we cannot construe the statutory language relied upon by appellee as evidencing a legislative intent to extend a bond's coverage to contracting classifications and work performed pursuant thereto clearly separate and apart from that for which the bond was issued. We realize that under certain fact situations there may be overlapping classifications and therefore arguably coverage under the various bonds supporting the overlapping licenses pursuant to which the work was done. However, such a situation was not presented to the court here. Under the uncontroverted facts, no materials were supplied and no work was done under the licenses supported by the bonds here in question.

Of course, many times neither the surety nor the claimant knows which license the principal used on the construction project, especially when the principal is out of business and the owner is nowhere to be found. Many times, the type of material supplied will be helpful, for example when the claimant supplied plumbing material and the principal had both a plumbing and an electrical license. However, that becomes more difficult when a general and a specific license are

involved, such as a 'residential and small commercial' B-2 license and a carpentry license.

Arguably, the burden is on the claimant to support its claim against a specific bond, but often times local judges will shift that burden to the surety or in fact will treat the bond like insurance and let the claimant recover from any and all bonds, even if the underlying licenses weren't used.



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## PENAL SUM ISSUES

In most cases, the maximum exposure of the surety is the penal sum of the bond. However, there are some exceptions where the surety litigates a bond claim and ultimately loses against the claimant. The two main exceptions are (1) where the claimant has made an offer of judgment and the surety refuses to accept it and then does worse at the time of trial; and (2) where after an arbitration award is rejected by the surety the surety does not do better at the time of trial.

### 1. Offer of Judgment.

Under two Offer of Judgment statutes, a claimant may recover attorney's fees and cost from the date the offer is made if the surety does not accept the offer and then does worse when the claim is ultimately decided on the merits. *Trs. of the Plumbers & Pipefitters v. Developers Sur. & Indem. Co.*, 120 Nev. 56; 84 P.3d 59 (2004). (On appeal by union trustees over denial of attorney fees, judgment was reversed; surety could be ordered to pay attorney fees even if fees award plus judgment, would exceed bond amount because surety engaged in direct litigation over bond.) However, such an award is not mandatory but discretionary. We recently dealt with a situation where the claimant made an offer of judgment, which was not accepted, and then did better after the trial court granted the claimant's motion for summary judgment. We were able to defeat the claimant's motion for attorney's fees with the following argument:

The Nevada Supreme Court has set forth factors which need to be met to award attorney's fees pursuant to NRCP 68 and NRS 17.115. Those factors include: (1) whether a party's defense was brought in good faith; (2) whether the Offer of Judgment was reasonable and in good faith in both its timing and amount; and (3) whether the decision to reject the offer was grossly unreasonable or in bad faith. *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983).

Here, as this Court well knows, Platte River's bond principal, JKB Paramount, contested Plaintiff's claim all the way through July, 2010, with motions, oppositions, and counter-motions. Platte River was entitled to rely on the defenses of its bond principal. It

therefore asserted its defenses in its filed Answer to the Complaint and The Amended Complaint in good faith.

Further, when the Offer of Judgment was made in December, 2009, Platte River also still had the claim of Frontier Fence for \$4,735.56. Thus, Platte River could not have accepted the Offer without prejudicing Frontier Fence, as the penal sum of the bond was \$50,000.00. At that time in this litigation, there was pending before this Court, Plaintiff's Motion for Summary Judgment against JKB Paramount only, which JKB has opposed. This Court denied Plaintiff's Motion in January, 2010! Had Platte River accepted Plaintiff's Offer in December, 2009, it would not only have prejudiced Frontier Fence, it would also have prejudiced its own indemnity claims against JKB Paramount.

Therefore, the decision to reject the offer at that time was both reasonable and in good faith.

## **2. Filing for Trial De Novo after an Arbitration Award.**

Nevada assigns most cases with a value of less than \$50,000.00 to arbitration, including cases involving bond claims. The arbitrator's decision is not binding on either party, and both the plaintiff and the defendant can reject the award by filing a so-called Request for Trial De Novo. If a surety files such a request and does not fare better at the subsequent trial, it exposes itself to a mandatory award of attorney's fees even in excess of the penal sum under the following circumstances:

a) Awards of \$20,000 or less. The party, which rejected the award, must beat the arbitration award by 20% or more. Thus, for example, if the arbitrator awarded the claimant \$15,000.00, the surety would have to pay the claimant's attorney's fees "associated with the proceedings following the request for trial de novo" if ultimately the claimant obtained a judgment for \$13,001.00. (The surety could recover its fees and cost if the reverse took place; i.e. if the claimant filed for trial de novo, and then didn't do 20% better than what the award had been.

b) Awards of \$20,000 or more. Here, the party rejecting the award will have to do at least 10% better at the time of trial than after the arbitration hearing.

## OTHER ISSUES

### 1. No Surety Bad Faith in Nevada

Nevada does not recognize surety bad faith, either by a bond principal or by a third party claimant. While the Nevada Supreme Court cases, which deal with this issue, pertain to first party claims, their holdings will obviously be extended to third party claimants by implication as Nevada also does not recognize third party bad faith claims against insurance company (Gunny v. Allstate Ins. Co., 108 Nev. 344), while allowing such first party claims.

The Nevada Supreme Court has more than once expressly rejected a bad faith claim against a surety because the public policy reasons for application of bad faith to first party insurance cases were not applicable to the case against the surety. Gibson Title, 134 P.3d at 698; General Builders, 113 Nev. at 346, 355, 934 P.2d at 263. In fact, the Nevada Supreme Court recently held: “*A surety cannot be liable for the tortious breach of the covenant of good faith and fair dealing.*” Insurance Co. of the West, 122 Nev. 455, 134, P.3d at 702. (Emphasis in original.) The Court refused to extend “bad faith” tort liability against surety companies because the surety relationship lacks the essential characteristics that mandate the imposition of that liability. Id. Surety ship does not present the “rare and exceptional case” of special reliance needed to protect a much weaker party from a “vastly” superior party. Id.

### 2. Federal Projects not Covered by Nevada License Bonds

NRS 624.031.8 states that NRS 624, the Nevada contractors license statute does not apply to “the construction, alteration, improvement or repair financed in whole or in part by the Federal Government and conducted within the limits and

boundaries of a site or reservation, the title of which rests in the Federal Government.”

### **3. Interpleader versus Pro Rata Distribution**

This issue arises whenever any numbers of valid claims exceed the penal sum of the bond. NRS 624.273 deals with this as follows:

5. The surety or the Board may bring an action for interpleader against all claimants upon the bond or deposit. If an action for interpleader is commenced, the surety or the Board must serve each known claimant and publish notice of the action at least once each week for 2 weeks in a newspaper of general circulation in the county where the contractor has his or her principal place of business. The surety is entitled to deduct its costs of the action, including publication, from its liability under the bond. The Board is entitled to deduct its costs of the action, including attorney’s fees and publication, from the deposit.

6. A claim of any employee of the contractor for labor is a preferred claim against a bond or deposit. If any bond or deposit is insufficient to pay all claims for labor in full, the sum recovered must be distributed among all claimants for labor in proportion to the amounts of their respective claims. Partial payment of claims is not full payment, and the claimants may bring actions against the contractor for the unpaid balances.

7. Claims, other than claims for labor, against a bond or deposit have equal priority, except where otherwise provided by law, and if the bond or deposit is insufficient to pay all of those claims in full, they must be paid pro rata. Partial payment of claims is not full payment, and the claimants may bring actions against the contractor for the unpaid balances.

It should be noted in this context that labor claims have priority, as do claims of union trust funds. A dilemma arises when valid claims do not exceed the penal sum of the bond, while an apparently invalid claim, if included, would exceed the penal sum by itself or in combination with the other claims. We recently had a situation where the bond principal was vigorously defending a claim through litigation without accepting the surety’s tender of defense, and when the court ultimately granted summary judgment in favor of the claimant, it also felt that the surety acted in ‘bad faith’ by not filing an interpleader or bringing the other bond claimants before that court. What then are the surety’s options in these cases?

1. It could file an interpleader anyway and by doing so give up the entire penal sum despite the apparent invalidity of one or more claims. Preferably, such an interpleader should be filed in the case which is in litigation.
2. It could wait until the disputed claim is resolved before settling the undisputed claims. Here, the court should be advised of the other claims, if the disputed claim is in litigation.
3. It could settle the undisputed claims anyway, thereby exposing itself to a potential payment in excess of the penal sum, if the claimant ultimately prevails.

#### 4. Indemnity

**Nevada strictly enforces most if not all provision of standard indemnity agreements.** A surety is entitled to full recovery of expenses, including attorneys' fees and costs, incurred in defending an action on a bond pursuant to an indemnity agreement. Transamerica Premier Ins. Co. v. Nelson, 110 Nev. 951, 956, 878 P.2d 314, 317 (1994) (holding that a surety is entitled to indemnity under an indemnity agreement for costs incurred in defending an action against the bond whether or not the surety had made any payment on the bond.) See also Ins. Co. of the West v. Gibson Tile Co., Inc. 134 P.3d 698, 701 (Nev. 2006) (holding that a surety is entitled to indemnity under an indemnity agreement for costs incurred in defending an action against the bond whether or not the surety had made any payment on the bond.)

In Transamerica Premier, the Nevada Supreme Court specifically addressed and enforced a general indemnity agreement containing similar provisions as the AI between Platte and the Indemnitors. Id. There, Transamerica, the surety, posted a contractor's license bond on behalf of Nelcon Construction, Inc. Id. at 315, 953 The company, along with its owners, Terry Nelson and Lisa Connor, executed a general indemnity agreement, agreeing to indemnify Transamerica for any costs incurred on the bond. Id. Subsequently, a bond claimant sued Transamerica. Id. Ultimately, Transamerica prevailed in defending against the bond claim,

successfully arguing that the claim was outside the bond's coverage. Id. at 316, 954 Transamerica then sought all costs associated with defending the action from the principal and Indemnitors. Id.

The Nevada Supreme Court held that a "surety is entitled to full recover of expenses incurred in defending the action on the bond." Id. at 317, 956. Furthermore, in discussing the ability of the surety to recover attorneys' fees and costs, the Court adopted "a standard under which courts should consider only whether the attorney's fees were incurred in **good faith** as a result of or in consequence of the issuance of the bond." Id. (emphasis added) Accordingly, in Nevada, a surety, pursuant to an indemnity agreement, is entitled to all attorneys' fees and costs incurred in good faith as result of the surety's issuance of a bond. Id.

Moreover, the Nevada Supreme Court recently reaffirmed its decision that a surety is entitled to attorneys' fees and costs on an indemnity claim. Ins. Co. of the West v. Gibson Tile Co., Inc., 134 P.3d 698, 701 (Nev. 2006). In Ins. Co. of the West, the Court held that "a surety is entitled, under a GIA, to indemnify for costs incurred in defending an action brought against it on a bond, regardless of whether any payment is ultimately made by the surety." Ins. Co. of the West, 134 P.3d at 701, citing Transamerica Premier. Although the sureties in Transamerica Premier and Ins. Co. of the West did not make any payment on the bond, the Court held that pursuant to the GIA the surety was entitled to indemnity for any fees and costs incurred in attempting to enforce the indemnity agreement, together with the principle payment. Id. Therefore, under Nevada law, Platte is entitled to full indemnity for all attorneys' fees and costs incurred in good faith pursuant to an indemnity agreement. Transamerica Premier 878 P.2d at 317; Ins. Co. of the West 134 P.3d at 701.