



JERRY CARTER

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HOW DO CONTRACTORS

**GET PAID
IN FULL**

*FOR THEIR NEVADA
CONSTRUCTION WORK?*

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MAKING THE DECISION TO GET PAID IN FULL

Thank you for making the choice to get this special report. Every construction season, many contractors like you deal with collection issues on their jobs. You might even be surprised how many of colleagues and competitors in Nevada have gone through the payment issues that you deal with now.

Unfortunately, you, as a construction contractor, do not have the luxury of relying solely on the good intentions of your owner or general contractor to get paid in full. Things can and do go wrong during the course of a construction project. As a stark example, you may have experienced the year 2008, when developers in Nevada suddenly ran out of money and were unable to borrow additional money due to the financial markets freezing. Even during good economic times, payment issues will arise. For instance, what happens when a long-standing developer or contractor retires or passes away and the business passes to family members who are less skilled at managing the business? Unfortunately, there is also a cynical side to the business. When disputes arise regarding the cost or quality of the construction, previously friendly developers or general contractors may use the threat of non-payment to get negotiating leverage over your company.

When you don't get paid in full, it doesn't just cut into your profit on the job. You still have to pay your own employees, suppliers, subcontractors, taxes, and insurance, as well as keep the lights on in the office.

The good news is that you recognize the payment risks that hang over every job you work. By getting this report, you are taking the initiative to make sure your firm gets paid in full for its construction work. You could have ignored this information and kept on sifting through all the random pieces of information available to you online. Instead, you now have a comprehensive resource about the legal tools in Nevada that will help you get paid in full for your contracting work.

This report shares some unique features of Nevada law that will assist you in getting paid for your contracting work. It will answer your questions about how to use Nevada mechanics liens, Nevada bond claims, Nevada's Prompt Payment Act, and helpful contract provisions to your advantage so that you can get paid in full. I will also let you in on a little secret as to how to reduce your reliance on attorneys in the collection process.

After I graduated from law school and clerked for a federal appeals court judge, I went to work for a large Chicago law firm. The first case I worked on was a collection case. Since then, I have enjoyed the feeling of meticulously following all of the required steps to collect what my client is owed. When I moved to Reno and began practicing in Nevada, I spent 17 years collecting fringe benefit contributions owed to Taft Hartley trust funds in the construction industry. While performing this and a lot of other collection work in Nevada, I gained an intimate knowledge of the Nevada collection tools.

One thing many do not realize about collection work is that it has a deeply primal quality. Oftentimes, I am called upon to collect money or ill-gotten property from people who have

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no intention of honoring their obligations and sincerely believe that the law cannot touch them. When these people find out otherwise, they lash out, and the past-due obligation must figuratively be ripped out of their hands.

So get ready! Once you've looked through this report, you should feel free to call us to discuss your legal issue. My hope is that you will look to us for help when you need it. We are excited to serve you.

Sincerely,



Jerry Carter

P.S. We are just a phone call away at 775-448-6070. Make sure you mention that you obtained this report, and we'll answer whatever questions you have.

QUESTIONS CONTRACTORS ASK ABOUT COLLECTING ON NEVADA CONSTRUCTION JOBS

Nevada has unique laws regarding mechanics liens, bond claims, and prompt payment. Here are some questions contractors ask about each of these Nevada collection tools.

Nevada Mechanics Liens

1. What is a Nevada mechanics lien? A mechanic's lien is a security interest in the title to real property and improvements. Nevada Revised Statutes Chapter 108 creates and governs mechanics liens in Nevada.

2. Who may claim a mechanics lien in Nevada? Under NRS 108.2214, any person who provides work, material or equipment with a value of \$500 or more to be used in or for the construction, alteration or repair of any real property or mining claim or improvement thereon may claim a mechanics lien. This includes builders, contractors, employees, suppliers of materials, renters of equipment, subcontractors, architects, engineers, and land surveyors.

3. What are the benefits of a Nevada mechanics lien?

A mechanics lien enhances the contractor's prospects of receiving timely payment for its work. Without a lien, the contractor would be left to sue on its contract without any security for payments that are owed. If the contractor correctly creates the mechanics lien, the contractor has recourse directly against the property in addition to its claims against those with whom the contractor has contracted. The mechanics lien also gives the contractor statutory priority of payment over certain other creditors.

The power of the mechanics lien is that the property owner cannot clear title to the property until it negotiates a resolution with the mechanics lien holder. Instead of the contractor chasing the property owner, the property owner has to come to the contractor. Moreover, if the property owner fails to negotiate a resolution, then the contractor has a statutory process for foreclosing on the mechanics lien.

4. What are the steps for creating a valid mechanics lien in Nevada? Nevada's mechanics lien statute requires strict compliance with a formalized process in return for the security interest and priority the mechanics lien gives to the contractor. These requirements, which have time limits, are as follows:

- *General Contractor's Notice* (NRS 108.246)—The prime contractor must deliver a general contractor's notice to the record owner and subcontractors before execution of a contract for construction is signed. NRS 108.246 provides a form for this notice.
- *Pre-lien Notice* (NRS 108.245)—Every potential lien claimant, other than an employee or prime contractor, must deliver a pre-lien notice to the owner and prime contractor by hand or certified mail within 31 days after the first delivery of material or performance of work or services. If the pre-lien notice is delivered later, it is only effective for work and supplies delivered in the previous 31 days. NRS 108.245 contains a form for the pre-lien notice and states the information to be included.

- *Deliver Notice of Intent to Lien to Owners of Residential Property* (NRS 108.226(6)): If the mechanics lien is to be created against a multifamily or single-family residence, the contractor must serve a 15-day notice of intent to lien with substantially the same information as a notice of lien (see NRS 108.226(5)) upon both the owner and the prime contractor by certified mail or certified mail.
- *Record Notice of Lien* (NRS 108.226)—The contractor or other mechanics lien claimant must record a notice of lien containing information about the property and the amount owed to the contractor. NRS 108.226 states the information that is required and has a form for this notice. The notice of mechanic’s lien must be recorded in the office of the county recorder of the county where the property is located. If the owner files a notice of completion, the contractor must record the notice of lien within 40 days after the notice of completion was recorded. If the owner does not file notice of completion, the contractor must record the notice of lien within 90 days of the later of: (a) completion of the work of improvement; (b) the last delivery of material; or (c) the last performance of labor.
- *Serve Notice of Lien* (NRS 108.227)—Within 30 days of recording the notice of lien, the contractor must serve a copy of the recorded notice of lien on the property owner and prime contractor by personal delivery, certified mail, return receipt requested, or by other methods specified in NRS 108.227.
- *Commence Suit to Foreclose on Lien* (NRS 108.233, NRS 108.244)—The contractor needs to commence a lawsuit to foreclose on the mechanics lien after 30 days but within six months of recording of notice of lien.
- *Record Discharge of Recorded Lien* (NRS 108.2437)—Within 10 days after the mechanics lien is satisfied, the contractor must record a discharge of recorded lien. NRS 108.2437 provides a form for the discharge and states the information that must be included.

5. What are the four biggest mistakes contractors make when it comes to Nevada mechanics liens?

- *Failing to deliver the pre-lien notice.* I have seen numerous instances where a contractor lost a mechanics lien by failing to deliver the pre-lien notice (NRS 108.226) at the commencement of the project. If the contractor fails to deliver the pre-lien notice, it must show that the owner had actual notice of the contractor’s presence on the job, a showing that can be difficult to make. One reason contractors sometimes do not deliver the pre-lien notice is that the contractors do not want to be perceived as too aggressive for payment at the beginning of the project. However, this kind of thinking can backfire. Whereas a routine notice at the beginning of the job is not likely to ruffle any feathers, waiting until the project is in trouble to start collection efforts will be taken personally by the struggling owner or general contractor.
- *Failing to record and serve the notice of lien on time.* The failure to timely record a notice of lien (NRS 108.226) is also fatal to a mechanics lien. To record the notice of lien on time every time, the contractor must have a routine calendaring process in place and effectively monitor the payment and completion status of its jobs.

- *Failing to implement a routine business process for preparing mechanics liens.* The previous mistakes reflect an over-arching issue, which is that the contractor needs to make a conscious decision to implement a routine process for perfecting (i.e., creating and maintaining) mechanics liens. Because of the way Nevada’s mechanics lien statute works, contractors cannot wait until a job is in trouble before paying attention to the mechanics lien process. It is far simpler and more effective to deliver the required notices every time rather than to pick and choose when they will be delivered. The mechanics lien process needs to include a set of mechanics lien forms, a method for calendaring the dates or events that will trigger each step and, and a system for documenting that each step has been taken. The Law Offices of Jerry Carter, P.C. has experience with this and we would love to discuss this with you.
- *Failing to review construction contracts for mechanics lien issues.* It is important for a contractor and its counsel to closely review construction contracts with an eye to the intricacies of Nevada’s mechanics lien statute. For instance, Nevada’s mechanics lien statute prohibits certain construction contract provisions that attempt to waive, modify, or impair a contractor’s mechanics lien rights. See, for example, NRS 108.2453; NRS 108.2457. In other situations, a contractor may inadvertently agree to contract provisions that dilute the power of the lien. For example, certain arbitration provisions may be enforced against the contractor and prevent the contractor from quickly foreclosing on its mechanics lien in court. When it comes to contract review, an ounce of prevention is better than a pound of cure. We would love to discuss contract review with you.

Nevada Bonds

NDOT Labor and Material Bonds

1. What is an NDOT Labor and Material Bond? On Nevada Department of Transportation (“NDOT”) jobs, the prime contractor must post a “labor and material” bond to secure taxes and “payment of claims for labor, materials, provisions, implements, machinery, means of transportation or supplies furnished upon or used for the performance of the contract.” NRS 408.357(3)(a).

2. How do I make a claim against an NDOT Labor and Material Bond? NRS 408.363(1) requires that the subcontractor or supplier must make its claim on the labor and material bond within 30 days from the date of final acceptance of the contract. The claim must be verified and submitted to NDOT in triplicate. A lawsuit on a claim against a labor and material bond is subject to a strict statute of limitations of six months from the date of NDOT’s final acceptance. Valid claims made on a labor and material bond must be paid with interest at 8% per annum. NRS 408.357(3)(b).

Nevada Payment Bonds

1. What is a Payment bond? For State of Nevada or Nevada municipality public works jobs worth more than \$100,000, other than jobs administered by the NDOT, NRS 339.025 requires that the prime contractor post a payment bond. NRS 339.025 (1)(b) states that the

payment bond is solely for the protection of claimants supplying labor or materials to the contractor to whom the contract was awarded, or to any of its subcontractors.

2. How do I make a claim against a payment bond on a Nevada public job? Per NRS 339.045, a person who has supplied labor or material on the job, and who has not been paid, may obtain a copy of the payment bond from the public entity. Per NRS 339.035(1), a bond claimant who has not been paid within 90 days after the date on which the claimant performed its last labor or furnished its last materials, may bring a lawsuit on the bond. Under NRS 339.055(2), the lawsuit must be filed before the expiration of 1 year from the date on which the claimant performed the last of the labor or furnished the last of the materials for the payment of which such action is brought. This means that the bond claimant effectively has a 275 day window within which to bring its lawsuit on the payment bond.

3. What special requirements apply to subcontractors and suppliers of subcontractors who desire to make a claim against a payment bond on a Nevada public job? A special restriction can sometimes trip up a subcontractor or supplier of a subcontractor. NRS 339.035(2) states that a claimant that has a direct contractual relationship with a subcontractor of the contractor who posted the payment bond, but no contractual relationship with such contractor, may not bring a lawsuit on the payment bond unless the bond claimant has given two written notices to the contractor. The first notice must be given within 30 days after furnishing the first materials or performing the first labor, and must inform the contractor of the nature of the materials being furnished or the labor performed, and identifying the person contracting for such labor or materials and the site for the performance of such labor or materials. NRS 339.035(2)(a). The second notice must be given to the contractor within 90 days from the date on which the claimant performed the last of the labor or furnished the last of the material. NRS 339.035(2)(b). “Each notice must state with substantial accuracy the amount claimed and the name of the person for whom the work was performed or the material supplied, and shall be served by being sent by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place in which the contractor maintains an office or conducts business, or at the residence of the contractor.” NRS 339.035(2)(b).

4. Can I make a claim against a payment bond on a private job? Although there is no statutory requirement, some owners on private jobs will require the prime contractor to purchase a payment bond. As a practical matter, the subcontractor or supplier who is seeking payment must use informal questioning or engage an attorney to find out whether a payment bond is in place and to obtain a copy of the payment bond. The earlier this happens, the better. Because there is no statute dictating the terms of a payment bond in this situation, the form of the payment bond will likely have specific requirements for giving notice and making a claim.

Nevada License Bonds

1. What is a Nevada License Bond? A subcontractor who has not been paid should also consider making a claim against a higher-tiered contractor’s license bond. NRS 624.270 instructs the Nevada Contractors Board to require each contractor to post a license bond as a condition of obtaining and maintaining its license. The license bond protects any person who as a supplier or materialman furnished materials or equipment for the construction

covered by the contract, among other categories of protected persons. NRS 624.273(1)(c). A copy of the license bond can be obtained from the Nevada Contractors Board.

2. Do contractors post any other type of security to maintain their contractors licenses?

Sometimes, a principal of a contracting firm will post a personal indemnity agreement in addition to or in lieu of the license bond. Despite having agreed to satisfy covered claims, principals who post indemnity agreements are sometimes loathe to honor their commitment. Therefore, it is usually necessary to engage an attorney to pursue aggressive action to collect on a personal indemnity agreement.

3. What are the advantages of pursuing a claim against a Nevada license bond? The amount of a license bond can sometimes be small in relation to the amount that is owed on the job. However, the contractor who has posted the license bond will be motivated to satisfy claims against the license bond for two reasons. First, the contractor cannot maintain its contractor's license if it allows its license bond to deplete. Second, the contractor in many instances will have pledged personal assets to the bonding company in the event the bonding company pays a claim on the license bond.

4. How do I make a claim against a Nevada license bond? A claim against a license bond is typically initiated by notifying the bonding company and then completing the bonding company's proof of claim form. In the event of multiple claimants against the license bond, claims by employees of the contractor for labor are given priority. NRS 624.273(6).

Nevada Bond Interpleader Actions

1. What is an Interpleader Action? An interpleader is lawsuit that is filed by a stakeholder to adjudicate competing claims to a fixed sum of money. This happens from time to time when multiple claimants assert claims against a bond that together, exceed the face amount of the bond. In the context of a bond interpleader, the bonding company is the stakeholder because it owes up to the face amount of the bond it issued. When multiple claimants seek to recover on the same bond, the bonding company will file a lawsuit in either federal or state court and name all of the bond claimants as interpleader defendants. The bonding company asks the court to require each of the bond claimants to adjudicate their claims in that single proceeding. Traditionally, the bonding company will deposit the face amount of the bond into court. In some instances, the bond amount does not get deposited but the bonding company offers to pay the bond amount in accordance with the court's ruling. In doing this, the bonding company may ask the court to allow the bonding company to deduct its attorney's fees and costs for bringing the interpleader lawsuit. Applicable law will determine whether such a request is valid. The bonding company typically also asks the court to discharge the bonding company from any liability as long as the bonding company deposits the face amount of the bond into court or follows the court's instructions as to how the bond payment is to be allocated amongst the bond claimants.

2. How are interpleader actions resolved? As a practical matter, the bond claimants who appear in an interpleader action will negotiate among themselves the manner in which the bond amount will be distributed. After reaching agreement, they will present a stipulation and order to the Court for approval. In deciding whether to approve the stipulation to distribute the bond amount, the court's primary focus is on making sure that all of the bond claimants were given proper notice of the interpleader action and an opportunity to be

heard. If the bond claimants are unable to agree as to distribution of the bond amount, they must litigate the interpleader lawsuit and seek a judicial determination as to any priority they are claiming. An interpleader action is an effective way to bring all of the competing claimants together in one lawsuit to resolve their competing claims.

Nevada's Prompt Payment Act

1. What is Nevada's Prompt Payment Act? Nevada's statute regarding payment of contractors, NRS 624.606-630, is colloquially referred to as the Prompt Payment Act. It provides general and subcontractors with time lines and a process for obtaining payment for their work. The Nevada Prompt Payment Act also gives general and subcontractors a process for obtaining and getting paid on change orders. To give these rights some teeth, the Nevada Prompt Payment Act also gives contractors useful stop work and contract termination remedies.

2. What rights do general contractors and subcontractors have to prompt payment?

NRS 624.609(1)(a) requires the owner to pay the general contractor "on or before the date a payment is due pursuant to a schedule for payments established in a written agreement." If there is no such payment schedule in a written agreement, NRS 624.609(1)(b) requires the owner must to pay the general contractor within 21 days after the general contractor submits a request for payment.

With respect to a subcontractor that has a written agreement with a payment schedule, NRS 624.624(1), requires that a general contractor or higher-tiered subcontractor pay the subcontractor on or before the earlier of: (1) the date payment is due; or (2) within 10 days after the higher-tiered contractor receives payment for all or a portion of the work. If the subcontractor does not have a written agreement with a payment schedule, NRS 624.624(1)(b) requires the higher-tiered contractor to pay the subcontractor the earlier of: (1) 30 days after the subcontractor submits a request for payment; or (2) within 10 days after the higher-tiered contractor receives payment for all or a portion of the work.

As stated in NRS 624.609(3) and NRS 624.624(3), an owner or higher-tiered contractor may not withhold payment unless it gives, on or before the date payment is due, a signed written notice identifying the amount of payment that will be withheld and giving a reasonably detailed explanation of the reason for withholding payment due the general contractor or subcontractor. If payment is withheld, the unpaid contractor may object to the notice or correct the condition identified in the notice and then demand payment.

In addition, NRS 624.620 requires payment of a prime contractor after the work of improvement is available for use or occupancy and discusses withholding in that situation.

3. What rights do general contractors and subcontractors have when they request change orders?

NRS 624.610(1)(d) states that if the general contractor submits a request for change order to the owner, the owner must: (1) issue the change order; or (2) give written notice to the general contractor of the reasons why the change order is unreasonable or explain that additional information are necessary to make a determination. If the owner fails to issue the

change order or timely provide the written notice, then the following consequences occur: (1) the agreement price must be increased by the amount sought in the request for change order; (2) the time for performance must be extended by the amount sought in the request for change order; (3) the general contractor may submit to the owner a bill or invoice for the labor, materials, equipment or services included in the request for change order; and (4) the owner must pay the general contractor's bill for the change order with the next payment made to the general contractor. NRS 624.610(3).

With respect to change orders, a lower-tiered contractor has the same rights with respect to its higher-tiered contractor that the higher-tiered contractor has with respect to the owner. NRS 624.626(1)(e) and NRS 624.626(3). This creates potential risk for a general contractor in a situation where the general contractor is unable to obtain a change order from the owner but the general contractor fails to validly and timely reject a corresponding change order requested by its subcontractor.

4. Under what conditions may a general contractor stop work? Nevada's Prompt Payment Act also gives contractors a powerful remedy in the form of the right to stop work. A general contractor has a statutory right to stop work on 10 days prior notice under any of the following circumstances:

- a. The owner fails to pay the general contractor in the time and manner required by NRS 624.609(1) or (4), discussed above (*see* NRS 624.610(1)(a));
- b. The owner withholds payment without giving a notice of withholding "in the time and manner" required by NRS 624.609(3), discussed above (*see* NRS 624.610(1)(b));
- c. If the owner gives a notice of withholding and the contractor gives a response notice under NRS 624.609(4) "and thereby disputes in good faith and for reasonable cause the amount withheld or the condition or reason for the withholding (*see* NRS 624.610(1)(c)); or
- d. If the general contractor submits a change order request and the owner fails within 30 days to issue the change order or provide a signed written notice explaining why the requested change order is unreasonable or identifying additional information that is needed regarding the requested change order (*see* NRS 624.610(1)(d)).

5. Under what conditions may a subcontractor stop work? A lower-tiered contractor has a statutory right to stop work on 10 days prior notice under any of the following circumstances:

- a. The higher-tiered contractor fails to pay the subcontractor in the time and manner required by NRS 624.609(1) or (4), discussed above (*see* NRS 624.626(1)(a));
- b. The higher-tiered contractor "fails to pay the lower-tiered subcontractor within 45 days after the 25th day of the month in which the lower-tiered subcontractor submits a request for payment (*see* NRS 624.626(1)(b)); this outside payment deadline applies "even if the higher-tiered contractor has not been paid and the

agreement contains a provision which requires the higher-tiered contractor to pay the lower-tiered subcontractor on if or when the higher-tiered contractor is paid” (*see* NRS 624.626(1)(b));

- c. The higher-tiered contractor withholds payment without giving a notice of withholding “in the time and manner” required by NRS 624.609(3), discussed above (*see* NRS 624.626(1)(c));
- d. If the higher-tiered contractor gives a notice of withholding and the subcontractor gives a response notice under NRS 624.609(4) “and thereby disputes in good faith and for reasonable cause the amount withheld or the condition or reason for the withholding (*see* NRS 624.626(1)(d)); or
- e. If the subcontractor submits a change order request and the higher-tiered contractor fails within 30 days to issue the change order or provide a signed written notice explaining why the requested change order is unreasonable or identifying additional information that is needed regarding the requested change order (*see* NRS 624.626(1)(e)); and
- f. When a higher-tiered contractor stops work, its lower-tiered subcontractors and suppliers have the same right to stop work (NRS 624.610(7) and NRS 624.626(7)).

6. What protections does a contractor have against delay damages when it stops work? The Nevada Prompt Payment Act also gives some protection against delay damages to contractors who validly stop work. NRS 624.610(9) and NRS 624.626(9) state that no contractor or subcontractor may be held liable for any delays or damages that an owner or higher-tiered contractor may suffer as a result of the contractor stopping its work or terminating an agreement for a reasonable basis in law or fact and in accordance with the Nevada Prompt Payment Act.

7. Under what conditions may a general contractor or subcontractor terminate its construction agreement?

NRS 624.610(2) states that if a general contractor validly stops work for failure of prompt payment or for a withholding issue, as discussed above, then the general contractor may terminate its construction agreement on 15 days’ notice. Of course, if the general contractor receives the disputed payment before the termination date, the general contractor may not terminate the agreement and must instead resume work. Similarly, NRS 624.626(2) states that if a subcontractor validly stops work for failure of prompt payment (but not for failure to meet the outside payment date described in NRS 624.626(1)(b)) or for a withholding issue, as discussed above, then the subcontractor may terminate its construction agreement on 15 days’ notice. If the subcontractor receives the disputed payment before the termination date, the subcontractor may not terminate the agreement and must instead resume work.

In addition to the termination reasons described above, NRS 624.610(4) says the prime contractor may terminate its agreement on 10 days’ notice if the owner causes the work to be stopped for 15 or more days as a result of neglect by the owner or the owner’s agent, excluding “acts of God, floods, fires, labor disputes, strikes or reasonable adjustments to

work schedules.” Subcontractors have a similar termination right under NRS 625.626(4). In either case, if work is allowed to resume within the 15 day notice period, then the construction agreement may not be terminated.

You should keep in mind that if a prime contractor validly stops work, the owner may terminate the construction agreement on 15 days’ notice. NRS 624.610(5). Likewise, if a subcontractor validly stops work, then the higher-tiered contractor may terminate the subcontractor’s construction agreement on 15 days’ notice. NRS 624.626(5).

8. What is owed to the contractor when its construction agreement is terminated pursuant to Nevada’s Prompt Payment Act? If a contractor’s agreement is terminated under the Nevada Prompt Payment Act, then payment becomes due. Payment to the contractor includes the following components:

- a. The cost of all work, labor, materials, equipment and services furnished by and through the contractor, including any overhead the contractor and its lower-tiered subcontractors and suppliers incurred and profit the contractor and its lower-tiered subcontractors and suppliers earned through the date of termination (NRS 624.610(6)(a) and NRS 624.626(6)(a));
- b. The balance of the profit that the contractor and its lower-tiered subcontractors and suppliers would have received if the agreement had been performed in full (NRS 624.610(6)(b) and NRS 624.626(6)(b));
- c. Interest (NRS 624.610(6)(c) and NRS 624.626(6)(c)); NRS 624.630 states that the interest rate is the higher of: (1) the rate agreed upon in the agreement between the parties; or (2) prime plus 4 percent at the time the agreement was signed or agreed to orally;
- d. The reasonable costs, including court and arbitration costs, incurred in collecting the amount due (NRS 624.610(6)(d) and NRS 624.626(6)(d)); and
- e. Attorney’s fees may be awarded in either direction, although the statutory language is not symmetrical. NRS 624.610(6) states that in any action brought to enforce the rights and obligations set forth in that subsection, the trier of fact may award reasonable attorney’s fees to the contractor and its lower-tiered subcontractors and suppliers. But if the trier of fact determines that the contractor stopped work or terminated the agreement without a reasonable basis in law or fact, the trier of fact may award reasonable attorney’s fees and costs, including court and arbitration costs, against the contractor.

9. Are there jobs to which some or all of Nevada’s Prompt Payment Act does not apply?

NRS 624.622(4) states that the provisions of Nevada’s Prompt Payment Act governing construction contracts between an owner and a prime contractor do not apply to an agreement between a prime contractor and: (1) “a natural person who owns a single-family residence for the performance of qualified services with respect to the residence”; or (2) a public body for the performance of work and labor on a public work. Notably, there is not a similar exception for subcontracts on such jobs. Thus, on such jobs, subcontractors will

have Nevada Prompt Payment Act rights and remedies with respect to higher-tier contractors that the prime contractor does not in turn enjoy against the owner.

In addition, it should be noted that federal law has its own prompt payment act provisions, which are different in substantial respects from the provisions of Nevada's Prompt Payment Act. The federal provisions have been held to supplant the Nevada provisions on certain federal jobs.

10. How do I deliver notices mentioned in Nevada's Prompt Payment Act? NRS 624.622 and NRS 624.628 state how and to whom stop work, and termination notices are to be delivered. These provisions also give the requirements for delivering notices of receipt of payment to lower-tiered contractors.

11. What Nevada Prompt Payment Act issues should be reviewed before signing a construction contract?

It is good practice to have an attorney review a construction agreement before signing it. Some contractors go the next step and engage an attorney to help develop some form agreements for repeated use.

One issue to review in the contract is the schedule of payments. Under Nevada's Prompt Payment Act, having a schedule of payments generally gets the contractor paid faster than if the agreement does not have a payment schedule.

Another issue that will require review is that some rights under Nevada's Prompt Payment Act cannot be limited or waived by contract, while others might be inadvertently given up. NRS 624.622(2) voids any contract provision that requires the prime contractor to waive rights under the Nevada Prompt Payment Act or which relieves the owner of its obligations under the Nevada Prompt Payment Act. It also voids any contract provision requiring a prime contractor to waive a claim for damages or extension of time to which the contractor might otherwise be entitled "as a result of delay, acceleration, disruption or an impact event that is unreasonable under the circumstances that was not within the contemplation of the parties at the time the agreement was entered into, or for which the prime contractor is not responsible." NRS 624.628(3) provides similar protections to subcontractors. We at the Law Offices of Jerry Carter, P.C. would love to discuss contract review questions with you.

THREE QUESTIONS YOU SHOULD ASK ABOUT COLLECTING ON NEVADA CONSTRUCTION JOBS

The nuts and bolts issues discussed above are important. But the answers to the following questions have the power to transform the way your firm collects the money owed on its Nevada construction jobs.

1. How can my construction firm minimize its attorney expenses in collecting on its Nevada construction work?

The key to this question is when you ask it. If you wait until a construction job goes into non-pay status, then you will face an agonizing cost-benefit analysis of whether you will lose more money if you hire an attorney to pursue the debt than you will if you simply give up on being paid. On the other hand, if you are proactive and asks this question before your firm bids the next job, then you can strengthen your firm's collection prospects at a fraction of the attorney cost.

With that approach in mind, here are the most cost-effective ways to use an attorney to get paid in full:

- a. Use the attorney to help you develop your firm's written collection procedures, with timelines and forms that your office staff can follow for every job;
- b. Have the attorney review your construction contracts with payment issues in mind; better yet, use your attorney to develop contract forms or standard contract provisions that are tailored to your firm's business;
- c. If you encounter an unusual situation, you can double-check with your attorney before you send a specific claim form or notice; and
- d. After your firm has gone through all of the other steps in its written collection procedures, then the last step will be to turn the non-paying account over to your attorney to send a written demand and pursue all appropriate statutory and contractual remedies.

2. Why are written collection procedures so important?

At the beginning of this report, I mentioned the work I have done on behalf of Taft-Hartley trust funds in collecting contributions. The reason why these trust funds are so effective at collecting money is that the law requires their trustees to create and follow reasonable written collection procedures. I have assisted with overhauling and updating such collection procedures. Written collection procedures state every collection-related activity that will take place, from the beginning of the process until the end. For a construction firm, the written collection procedures will include timelines and forms for serving all mechanics lien notices, timelines and forms for bond claims, timelines and forms for Prompt Payment Act notices, timelines for management to review the payment status of jobs for which payment is past due, timelines and forms for making written demand for payment, and timelines for seeking attorney assistance with accounts that are past due. The beauty of this system is that office staff and management perform the vast majority of the work to bring in payment.

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Furthermore, all required steps are taken as a matter of routine, rather than on a case-by-case basis that creates the potential for mistakes and oversight. That way, if an attorney must be engaged at the end of the process, all potential collection remedies have been preserved, and he can collect more money with less attorney effort. Developing collection procedures and forms is a service the Law Offices of Jerry Carter, P.C. loves to provide because it gives your company the most bang for its buck while preserving your control over the process.

3. Why should I use written construction agreements that have been drafted or reviewed by my attorney?

Prudent contractors use written agreements for all of their construction work. Although certain oral agreements may be enforced in Nevada, others may be barred by Nevada's Statute of Frauds. Beyond enforceability issues, it is easier to determine the terms of a written agreement than to figure out what the parties agreed to verbally. After a dispute arises, the parties always remember things differently. Furthermore, Nevada construction statutes give stronger rights to holders of written agreements than to holders of mere verbal agreements.

Not only is it important to use a written agreement, but it is also prudent to have an attorney draft or review your agreement before it is signed. An experienced attorney can make sure the agreement says what you think it says. He can also alert you to potential difficulties in getting paid under the agreement. Among other important issues, you will want the attorney's input on issues such as timing of the initial payment, timing and requirements to obtain progress payments, and security for payment.

If you have additional questions about how to get paid in full for your Nevada construction work, please call us at 775-448-6070. We would love to hear from you, and your questions may also help us improve future versions of this guide!

PUTTING IT ALL TOGETHER-HOW YOUR FIRM TURNS ITS NEVADA CONSTRUCTION WORK INTO CASH

Creating or Updating Written Collection Procedures

If your firm needs to create or update written collection procedures, then here is the process the Law Offices of Jerry Carter, P.C. follows to assist you:

First, management and, sometimes, office staff meet with us to discuss the current collection procedures that are in place. At this time, your firm provides us any written procedures it may have. We also discuss what your firm's informal procedures are. Likewise, we discuss where in the process your firm is encountering collection difficulties.

Second, our law office recommends solutions to shore up any weak spots in the collection procedures. We and your firm discuss the best way to implement the recommended solutions and incorporate them into the office staff's routine. This discussion can take place in person, by phone, or via email.

Third, after you say which recommendations you wish to incorporate, we prepare and deliver to your firm a set of written collection procedures showing the actions to be taken, the timing of each action, and a fill-in-the blank form to be used for that action.

Fourth, we have a wrap-up meeting with your firm to make any necessary refinements to the procedures and to make sure that office staff and management know how they will use the procedures.

Collecting a Delinquent Payment

With written collection procedures in place, your firm's process for collecting job payments becomes more straightforward. Here is the process your firm will follow to collect a delinquent payment:

First, your firm's office staff and management follows its written collection procedures. This includes making sure that the payment terms of its contracts are reviewed by counsel or follow pre-reviewed forms, timely sending required mechanics lien notices, timely sending payment bond notices, timely sending Prompt Payment Act notices, timely recording mechanics liens, timely making bond claims, and sending one or more additional written payment demands advising that the matter will be referred to counsel for collection.

Second, your firm's written collection procedures will set the cut-off point at which the matter is referred to counsel for collection. At this point, your firm will provide us with the construction agreement, detail about the payment status of the job, and all of the forms your firm generated and sent in the process of following its collection procedures. Of course the Law Offices of Jerry Carter, P.C. can help you collect payment for your Nevada construction work even if your firm has not created or followed written collection procedures in the past. Just keep in mind that following written collection procedures is the most effective and least expensive way to get paid in full for your Nevada construction work.

Third, when our office receives your information, we send a 10-day written demand for payment on all responsible parties, owners, as long as this can be done before any applicable statutory deadlines expire. If the responsible parties timely respond with a payment offer, then we communicate that offer to you. As you direct, additional payment negotiations may take place.

Fourth, if the responsible parties do not offer to pay a satisfactory amount, then we will advise your firm of the timing and availability of litigation options, such as a lawsuit to foreclose on a mechanics lien, or a lawsuit to enforce a bond, prompt payment, or other obligation. Your firm then determines whether to authorize litigation.

Do you want to meet with us to discuss how this process can strengthen your firm's collections for Nevada construction jobs? Call us at 775-448-6070 to arrange a free consultation.

THE END RESULTS

At the outset of a construction job, all of the parties are usually getting along well. That is when you need to put in place an appropriate agreement and make sure you have taken any pre-dispute actions that are necessary to preserve your right to use a mechanics lien or make a bond claim should subsequent circumstances make that necessary. The choice you need to make is whether you will create a routine process that your company follows in every job. With a routine process, your company is much more likely to preserve and protect its payment rights. Without a routine process, necessary pre-dispute notices will not always be given, and critical Nevada payment rights may be lost.

If a job gets in trouble, be prepared to exercise your Nevada rights. Your success in payment negotiations depends on your company knowing, preserving, and exercising its rights.

An experience of a client who I will call “George” can illustrate the power of following written procedures to take advantage of the Nevada collection tools. George owned a small construction firm. After not being paid on a construction job, George learned too late that his company had not complied with the deadlines for collecting on a mechanics lien. He came to my firm frustrated and unsure of how to prevent that from happening again. I worked with him to understand the steps his firm followed from bidding a job all the way to the conclusion of the job, and which company employees were involved in each step. Based on that, I prepared a packet of mechanics lien forms. Not only that, but we together developed a set of written procedures, including timelines, for the firm to protect its mechanics lien on each job. George has since retired. But he never had to call me again about a failed mechanics lien. Of course not all legal matters get the same results, and your firm’s optimal procedures may be different than George’s.

One helpful aspect of following written collection procedures is that, when your firm does not get paid in full, it will be in a position to make a timely referral to counsel. In one noteworthy collection case that was referred to me, I discovered that the non-paying and insolvent contractor had obtained a license bond. In addition, three principals of the firm had also delivered personal indemnity agreements to the Nevada Contractors Board. The principals claimed they were no longer involved in the business. But they had not delivered notices to the Contractors Board revoking their personal indemnity agreements. On behalf of the client, I sued all of the principals and the bonding company. After obtaining summary judgment against all of them, I obtained writs of execution and sent the Sheriff to garnish the principals’ bank accounts. After the Sheriff seized sizeable bank account balances, the principals lashed out and made personal attacks against my client and against me. Nevertheless, the Court overruled their objections to the garnishments and my client received the seized bank account balances. The bonding company also paid the amount of its bond.

Other collection matters are more routine. In another matter, I made a demand on a payment bond company on behalf of the client. When the demand was ignored, I filed suit for the client. When it came time for the payment bonding company to respond to extensive discovery requests, the payment bonding company finally decided to pay what it owed and the matter was concluded.

Please appreciate that all payment collection cases have different circumstances, different potential remedies, and different outcomes.

Our team is standing by to help you. As a matter of fact, we look forward to your call and the chance you as we have served others in our community. While we certainly can't guarantee any results, we may be the right firm for you. The best way for us to find out is by calling us at 775-448-6070 to arrange a free consultation.