

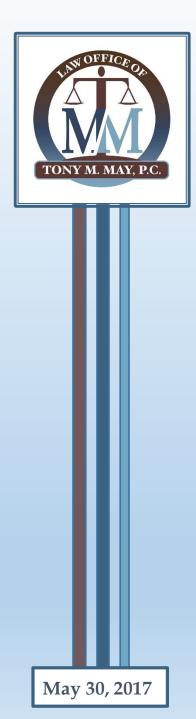
Presented by:



Tony M. May, Esq.

Founder and President of Law Office Of TONY M. MAY, P.C. 1850 E SAHARA AVE, STE 206 Las Vegas, Nevada 89104 Telephone: (702) 388-0404 Facsimile: (702) 830-5699 Email: tmay@tmm-law.com

May 30, 2017

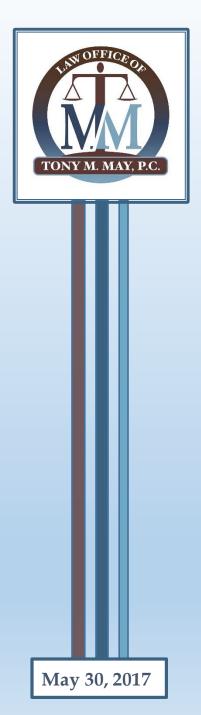


INTRODUCTION OF PRESENTER

TONY M. MAY, ESQ.

1. Accomplishments:

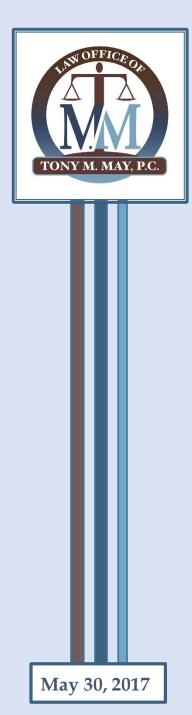
- B.S. Civil Engineering (Magna Cum Laude), UNLV 1994;
- Registered Professional Engineer (CA), since 1996;
- Juris Doctorate (with distinction), University of Iowa College of Law, 2001;
- Admitted to practice law in Nevada and California;
- Vegas Inc.: Recognized as one of Top Lawyers of 2012
- Desert Companion Magazine: Recognized as one of The Valley's Top Lawyers 2014



INTRODUCTION OF PRESENTER

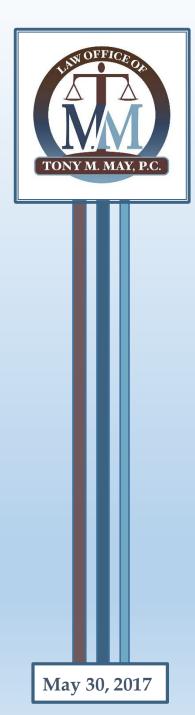
TONY M. MAY, ESQ.

- 1. Accomplishments (Cont.):
 - Represented all facets of the construction industry, including owners, general contractors, subcontractors, design professionals, material suppliers, equipment suppliers and manpower companies.
 - Co-Author of the book "State-by-state Guide to Construction Contracts and Claims."
 - Selected as a Bar Examiner for the State Bar of Nevada.



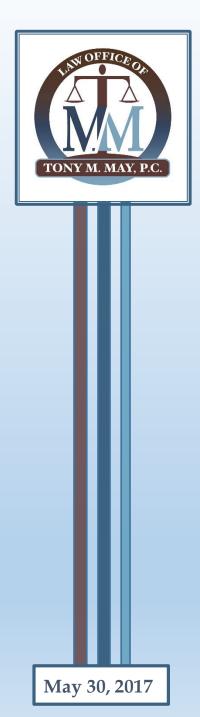
COURSE OUTLINE

- **1.** What is a bond and what does it do?
- 2. NEVADA STATE CONTRACTORS BOARD BONDS.
- **3. BID BONDS.**
- 4. **PERFORMANCE BONDS.**
- 5. PAYMENT BONDS.
- 6. PUBLIC WORKS BOND REQUIREMENTS.
- 7. NDOT BOND REQUIREMENTS.
- 8. FEDERAL MILLER ACT BOND REQUIREMENTS.



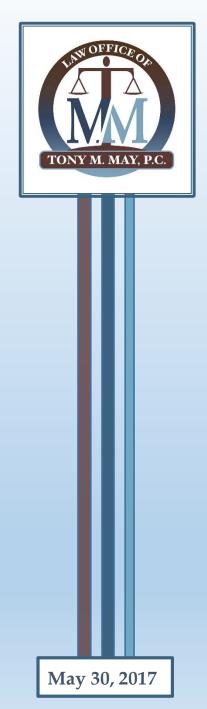
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WHAT IS A BOND

- 1. Bond is not Insurance
 - ➤ Lets look at a table to discuss the difference...



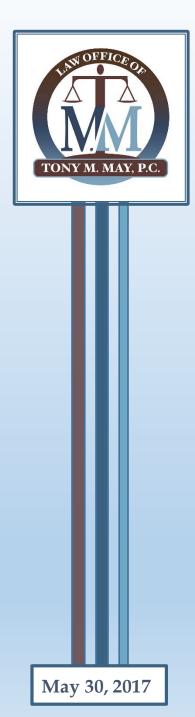
WHAT IS A BOND¹

Bonds

Insurance:

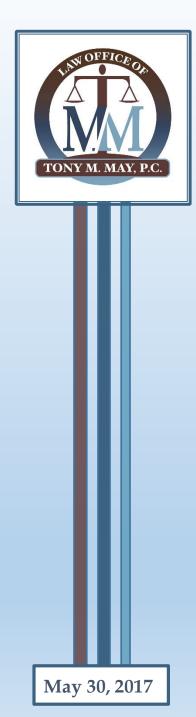
- Contract: Personal guarantee
- Protection: 3rd-Parties
- Premium: For guarantee
- Losses: Not expected
- <u>Claims</u>: Principle must repay

- Risk Management
- Purchaser
- For potential loss
- Expected, in rates
- No repayment



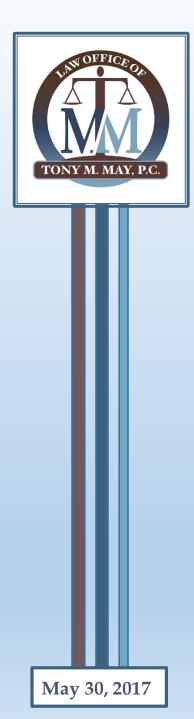
WHAT IS A BOND

- 2. General Purpose:
 - ➤ Individual cannot take the King's property.
 - ➤ Governmental agency will pay for project costs.
 - Bond claim requirements vary from state to state and even within State, depending on type of project.



COURSE OUTLINE

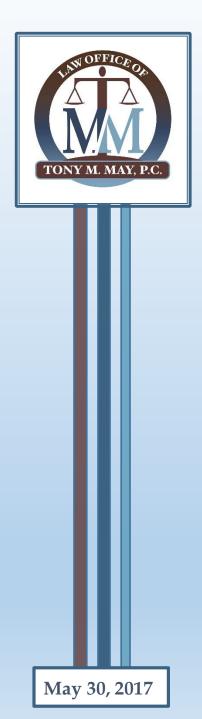
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NSCB LICENSE BONDS

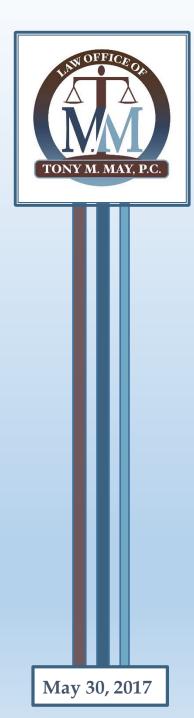
1. Purpose of a NSCB License Bond

- The purpose of this type of bond is a type of guarantee that the contractor will be able to pay a certain amount of damages, if it is found liable by the NSCB.
- This type of bond is mandatory for every contractor with a license from the NSCB.
- It also gives NSCB leverage over contractors and allows it to put pressure on contractor to do what they want, or risk loosing their license.
- According to NRS 624.270, the required license bonds ranges from \$1,000 to \$500,000, rarely over \$50,000.



NSCB LICENSE BONDS

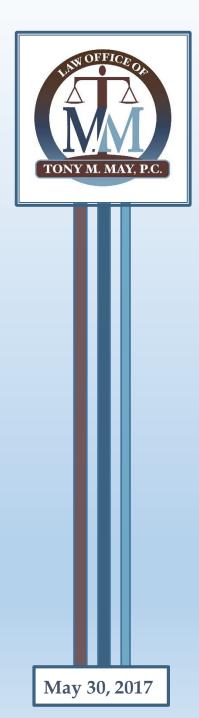
- 2. Who is protected from a NSCB License Bond
 - Pursuant to NRS 624.270, the following people are protected from the license bond:
 - Project/property owners;
 - The contractor's employees; and
 - Any other party who is injured by an unlawful act performed by the contractor.
 - Subcontractors
 - Suppliers



NSCB LICENSE BONDS

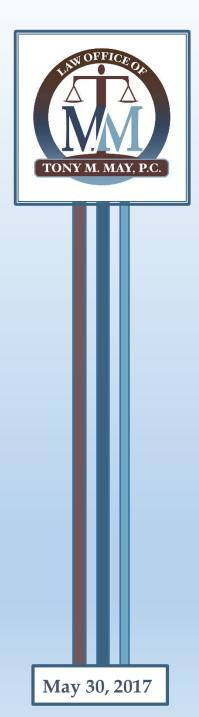
3. Alternatives to the NSCB License Bond

- Contractor can chose to guarantee its work by agreeing to be personally liable.
- Contractor can also deposit the amount of its bond with the NSCB, in lieu of obtaining a bond.
- This form of guarantee can only be withdrawn two years after the contractor obtains a bond, ceases to do work or two years after all work is completed by contractor.
- Two years is the statute of limitation on NSCB license bonds.



COURSE OUTLINE

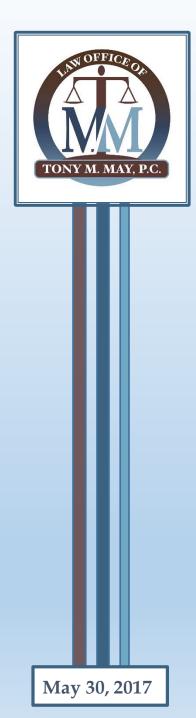
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BID BONDS

1. What is the purpose of a Bid Bond?

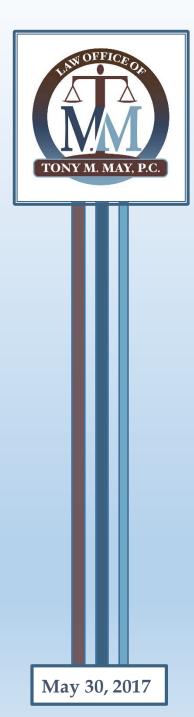
- Bid Bonds not normally required on private projects;
- On publicly funded projects, bidding is normally awarded to the low bidder;
- Bid bond ensures that the low bidder will enter into a contract for the work within its bid, if it is awarded the contract.



BID BONDS

2. Who is protected by a Bid Bond?

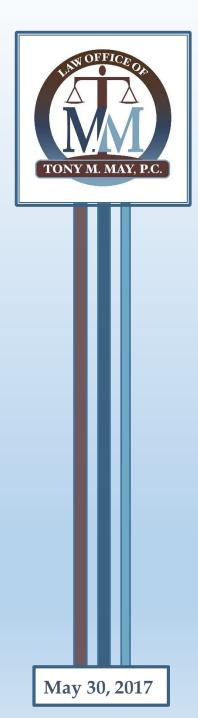
- Bid bond protects the owner or government agency from a contractor refusing to enter into contract after it is awarded bid;
- If a bidder refuses to perform the contract after the award, the government agency can seek payment from the bonding company, as allowed by statute;
- If a low bidder refuses to go forward, the government agency will have to pay more for the work to next lowest bidder;



BID BONDS

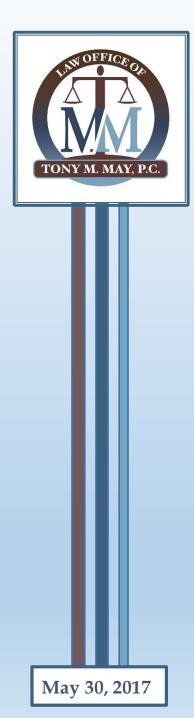
3. Who can pursue a claim against a Bid Bond?

- Since the bid bond is required by the owner or government agency, normally only the owner can pursue a claim against the bid bond.
- If used on a private project, the wording contained in the bid bond will control who has rights to pursue a claim against the bid bond.
- For public projects, the statutes governing the rules for bidding will likely control who has right to pursue claims against the bid bond.
- Followed by the language in the bond, if it is broader.



COURSE OUTLINE

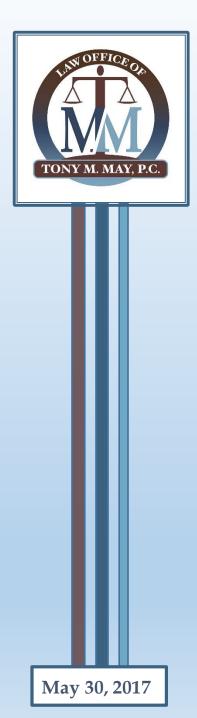
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Performance Bonds

1. What is the purpose of a performance bond?

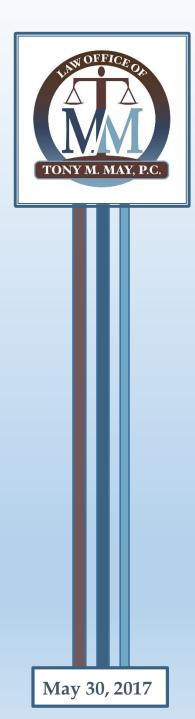
- Performance bonds are usually required by statute whenever a general contractor bids on a job that is funded by a government agency.
- A performance bond is meant to ensure that the general contractor, who is found to be low bidder, performs all of the work included in the bid in a proper manner.
- Requiring low bidder to provide performance bond makes it more likely that it will complete the work in a proper manner.



Performance Bonds

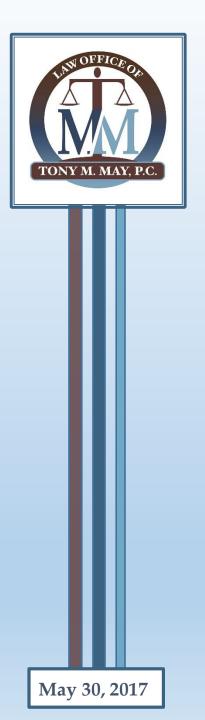
2. Who is protected by a Performance Bond?

- ➤ A performance bond is required to ensure that the general contractor will complete the project.
- A performance bond can also be used by a government agency to fix defective work.
- If the surety pays the owner for the contractors' failure to complete or for defective work, it will seek reimbursement from the contractor or the contractor's principle.



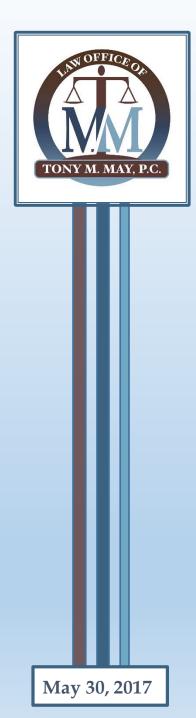
PERFORMANCE BONDS

- 3. Who can pursue a claim against the Performance Bond?
 - Since the purpose of the performance bond is to require the faithful performance of the contract, the owner/government agency will always have a right to pursue a claim against the performance bond
 - Private projects, the language in the performance bond governs.
 - Public projects, the language of the statute and bid documents will govern the scope of the performance bond, unless bond language is broader.



COURSE OUTLINE

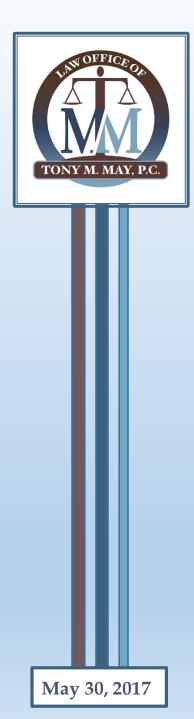
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PAYMENT BONDS

1. What is the purpose of a Payment bond?

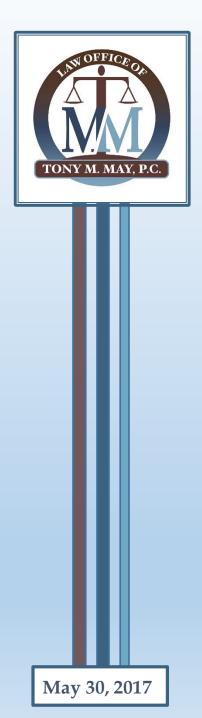
- The Payment bond is required by owners/ governmental agencies to make sure the general contractor pays for all of the labor and materials on the project.
- In short, if the general contractor does not pay for the labor and/or materials provided by the subcontractors or suppliers, they can seek payment from the general contractor's surety.
- Provided the bond covers their work or materials provided to the Project.



PAYMENT BONDS

2. Who is protected by a Payment bond?

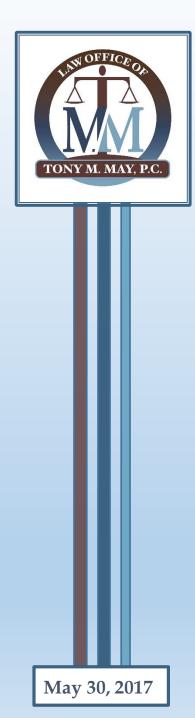
- ➤ A payment bond is generally required by the owner/government agency to make sure that the subcontractors and material suppliers get paid.
- Usually set up to protect subcontractors and suppliers, but not all of them.
- Private projects, the language of the bond dictates who is protected and who can pursue a claim against the payment bond.
- Public projects, the language of the statute mandating the payment bond will control, followed by bond if language is broader than statute.



PAYMENT BONDS

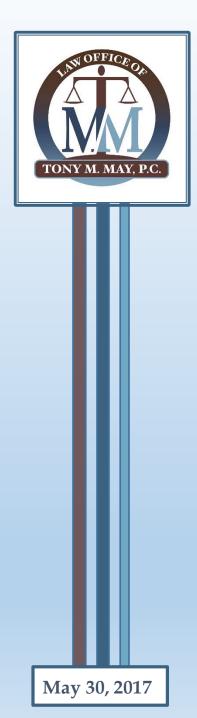
3. Who can pursue a claim against a Payment bond?

- Generally, subcontractors and suppliers who have contracts with general contractor are covered.
- Private Projects: Those beyond (i.e., 2nd tier subcontractors and suppliers), depends on wording of bond.
- Public Project: Those beyond (i.e., 2nd tier subcontractors and suppliers), depends on statute and then wording of bond if it is greater.

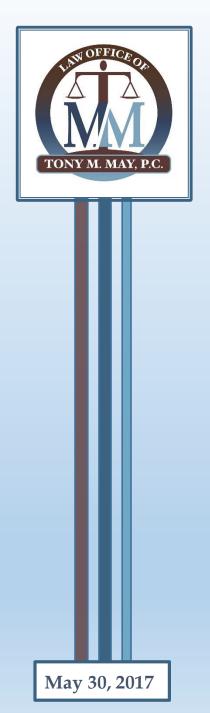


COURSE OUTLINE

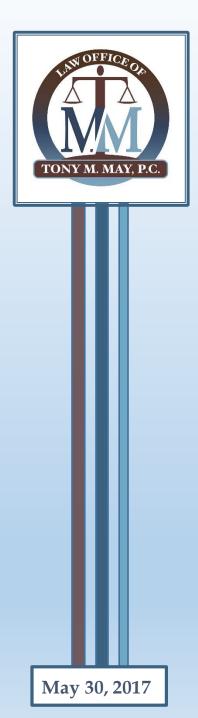
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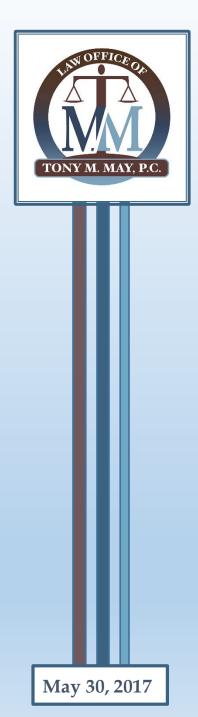
- 1. NRS Chapter 339:
 - The bond requirements for public works projects, except for NDOT projects are found within NRS Chapters 339.
 - According to Nevada Supreme Court:
 - <u>Capriotti, Lemon & Assoc. vs. Johnson Serv. Co.</u>, 84 Nev. 318, 440 P.2d 386 (Nev. 1968)
 - A bond required by statute is deemed to be a statutory bond, so statutory provisions are read into bond.



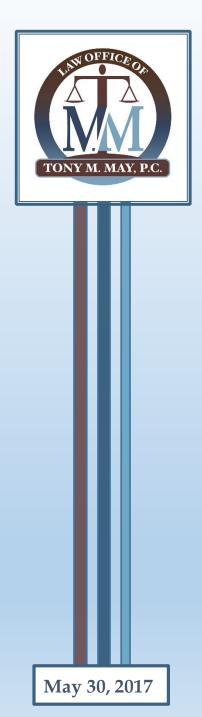
- 1. NRS Chapter 339 (Cont.):
 - <u>Capriotti, Lemon & Assoc. vs. Johnson Serv. Co.</u>, 84 Nev. 318, 440 P.2d 386 (Nev. 1968)
 - Payment bond obtained by General Contractor for Project.
 - Subcontractor went bankrupt after it got paid.
 - 2nd tier subcontractor sued surety for payment under bond.
 - 2nd tier subcontractor denied for failure to give proper notice.
 - Notice required by statute, but not in bond.



- 2. NRS 339.025 (Performance and Payment Bonds):
 - Requires a general contractor to obtain both a performance and payment bond for all government contracts for public construction projects, if the contract amount is over \$100,000.
 - Requires all subcontractors who contract to perform work in excess of \$50,000 or 1% of entire project costs (*whichever is greater*) to obtain a performance bond in an amount to be set by the governing body.



- 2. NRS 339.025 (Performance and Payment Bonds):
 - Performance Bonds:
 - Amount is determined by government entity.
 - Cannot be less than 50% of total contract amount.
 - Must be solely for protection of the government entity.
 - No other party has claim on Performance Bond.

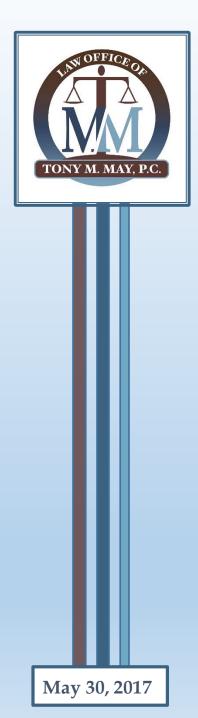


PUBLIC WORKS BONDS

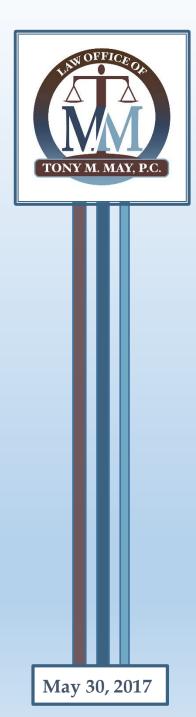
2. NRS 339.025 (Performance and Payment Bonds):

Payment Bonds:

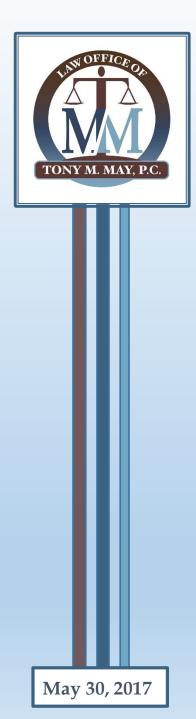
- Amount is determined by the government entity.
- Cannot be less than 50% of total contract amount.
- Must be solely for protection of:
 - GC's subcontractors;
 - GC's suppliers; and
 - 2nd tier subcontractors.
- No other party has claim on NRS 339.025 Payment bonds.



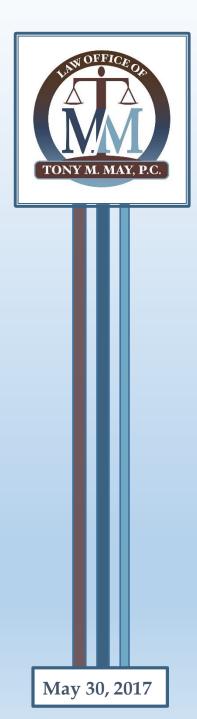
- 2. NRS 339.025 (Performance and Payment Bonds):
 - Additional requirements:
 - All bonds must be from surety company authorized to do business in State of Nevada.
 - Bonds must be filed in office of government entity contracting for the work.
 - Miscellaneous provision:
 - NRS 339.025 does not prohibit a government entity from requiring bonds, even if not required per this chapter.



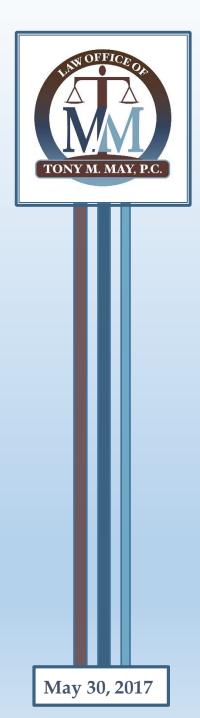
- 3. NRS 339.035 (Actions on Payment Bonds):
 - <u>1st tier subcontractor/supplier requirements:</u>
 - If have not been paid, provide the surety with a written notice of claim within 90-days of last providing labor or materials to the Project;



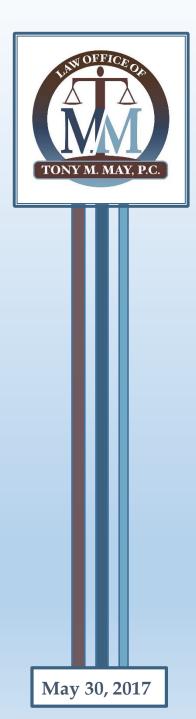
- 3. NRS 339.035 (Actions on Payment Bonds):
 - <u>2nd tier subcontractor requirements:</u>
 - Within 30-days of providing labor or materials, must provide GC with written notice of scope of work/materials to be provided.
 - Within 90-days of last providing labor/ materials, provide written notice to <u>GC and</u> <u>Surety</u> of a notice of claim.
 - 90-day Notice must state, with substantial accuracy, the amount claimed and name of claimant.
 - Notices must be sent by registered/certified mail.



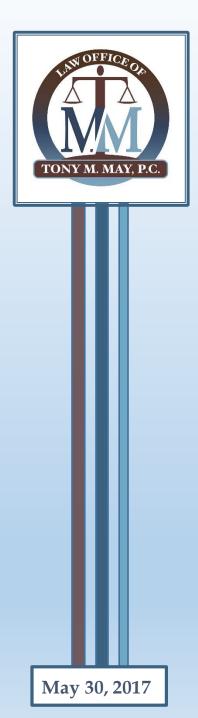
- 3. NRS 339.035 (Actions on Payment Bonds):
 - *Amfac Distrib. Corp. v. Housing Auth.*, 100 Nev. 573, 688 P.2d 318 (Nev. 1984).
 - Subcontractor pursued claim against payment bond, but provided the 30-day notice to the GC more than 30-days from commencing work.
 - GC and surety claimed subcontractor forfeited right to pursue claim against bond
 - Nevada Supreme Court found that subcontractor could maintain claim for all money earned 30days prior to initial notice being served on GC.



- 3. NRS 339.035 (Actions on Payment Bonds):
 - Garff v. J. R. Bradley Co., 84 Nev. 79, 436 P.2d 428 (Nev. 1968).
 - Subcontractor pursued claim against payment bond, but did not provide the 30-day notice.
 - Subcontractor pursued theory that 30-day notice not required because GC had actual knowledge subcontractor worked on project.
 - Nevada Supreme Court found that subcontractor could NOT maintain claim.

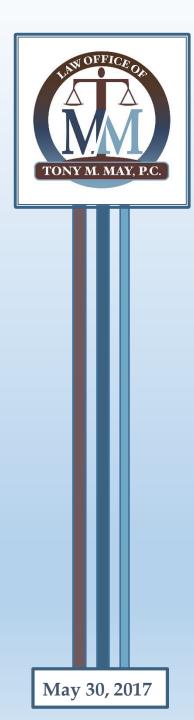


- 3. NRS 339.035 (Actions on Payment Bonds):
 - Hartford Fire Ins. Co. v. Trs. of the Constr. Indus. & <u>Laborers Health & Welfare Trust</u>, 125 Nev. 149, 208 P.3d 884 (Nev. 2009).
 - Trustees of the union trust funds brought claim against GC's bond for nonpayment of trust funds.
 - Court found that trustees, as third-party beneficiary, could pursue claim.
 - Court also found that trustees were required to follow both 30-day and 90-day rules to obtain rights against Payment Bond.



PUBLIC WORKS BONDS

- 4. NRS 339.045 (Certified Copies):
 - The contracting entity is required to provide certified copies of the payment bond, for a fee, upon receipt of an affidavit stating:
 - Claimant has provided labor/materials and has not been fully paid;
 - Claimant is defendant in action brought against Payment Bond; <u>OR</u>
 - Surety is in action where claim is being made against bond.

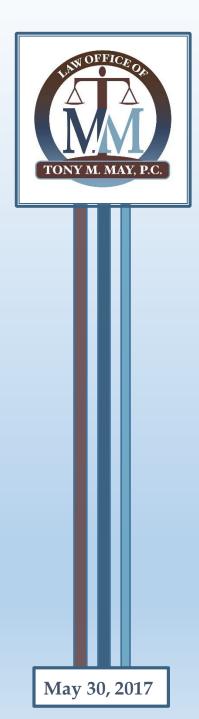


PUBLIC WORKS BONDS

- 5. NRS 339.055 (Venue and Limitations):
 - Claimant must pursue lawsuit in county court where project was to be performed.
 - Claimant must bring lawsuit within 1 year of last performing work.

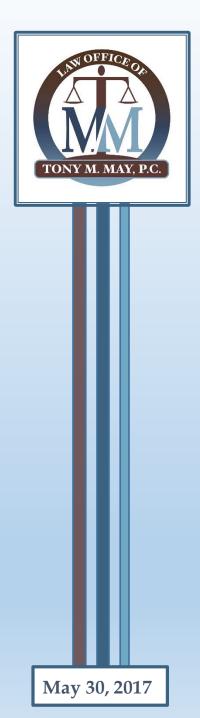
6. NRS 339.065 (Further Limitations):

- It is unlawful for any government representative to require a bond to be furnished by a particular surety company.
- Any violation of this provision = guilty of misdemeanor.

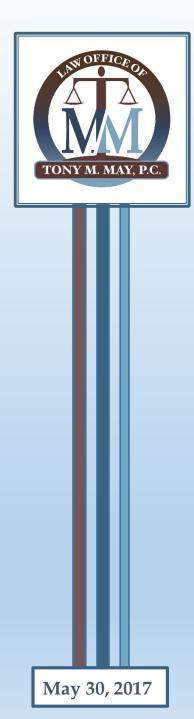


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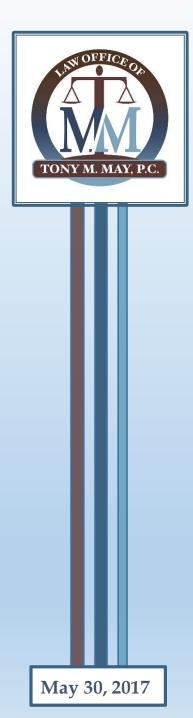
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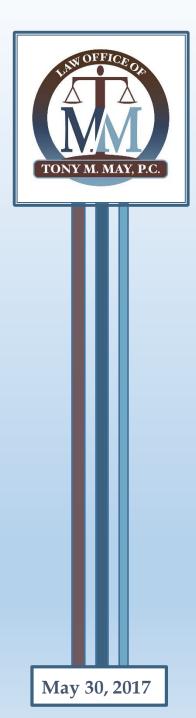
- 1. NRS Chapter 408:
 - NRS Chapter 408 governs the Nevada Department of Transportation or "NDOT," including the bidding and contract performance of all NDOT construction projects.
 - NDOT projects must include a Performance Bond or Payment Bond, or both.
 - No monetary limit because these projects, by their very nature, are large.



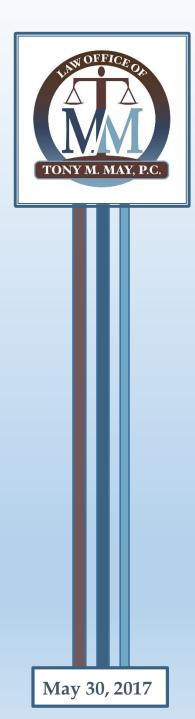
- 2. NRS 408.337 (Bid Security):
 - <u>Bid Bond</u>: Every bid submitted to NDOT must contain a bond, cash or certified check in the amount of 5% of its bid amount.
 - If successful low bidder fails to execute contract or furnish required Performance/Payment Bond(s) within 20-days after contract award, security is forfeited.
 - NDOT then turns to next lowest bidder.
 - NDOT to keep 2nd and/or 3rd lowest bidder's security until contract awarded.



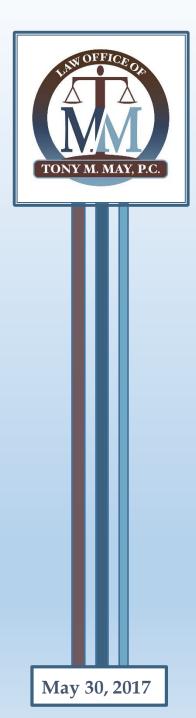
- 3. NRS 408.354 (Contract awarded to Railroad Company):
 - No Payment or Performance Bonds will be required on land owned by a railroad company if the director of NDOT decides a Payment or Performance Bond should not be required.



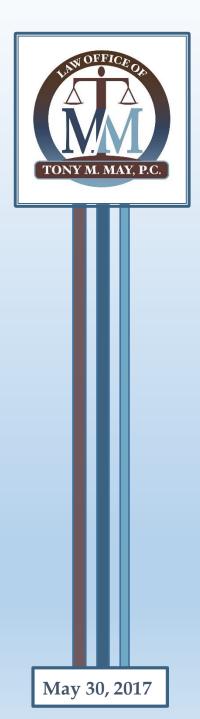
- 4. NRS 408.357 (Bonds required for Successful Bidders):
 - All NDOT projects, except for railroad projects, must require a Payment and/or Performance Bond.
 - Performance Bonds:
 - Must include guarantee for faithful performance of contract per plans and specifications;
 - Must be maintained for at least 1-year after completion of project.



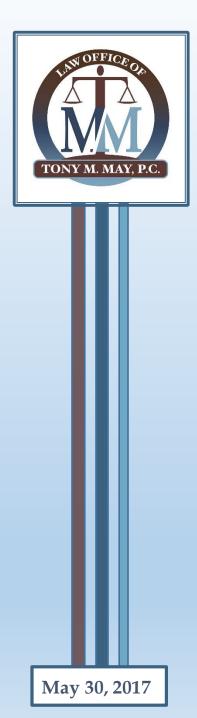
- 4. NRS 408.357 (Bonds required for Successful Bidders):
 - Payment Bonds:
 - Must cover payment of state and local taxes related to contract;
 - Must cover claims for labor, materials, provisions, implements, machinery, means of transportation or supplies furnished upon or used for the performance of the contract.
 - Must provide that if GC or subcontractors fail to pay, Surety shall make required payment in amount not exceeding sum specified in bond, plus interest at 8% per annum.



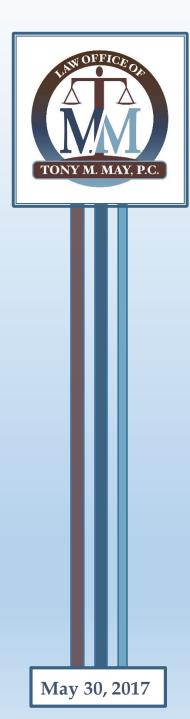
- 5. NRS 408.363 (Claims against Contractor's Bond):
 - Payment Bonds (Cont.):
 - Anyone providing labor, materials, provisions, implements, machinery, means of transportation or supplies used by or consumed by GC or its subcontractors and has not been paid in full can pursue a claim against the GC's bond.
 - Claimant must provide three copies of a written, signed and notarized claim to NDOT within 30days of date of final acceptance of the project.



- 5. NRS 408.363 (Claims against Contractor's Bond):
 - Payment Bond (Cont.):
 - <u>Zalk-Josephs Co. v. Wells Cargo</u>, 77 Nev. 441, 366
 P.2d 339 (Nev. 1961).
 - Supplier provided materials to NDOT project and did not get paid.
 - Supplier filed lawsuit against GC and bonding company.
 - Court found that Supplier failed to provide claim within 30-days and also failed to file lawsuit within 6-months of final acceptance of project.
 - Supplier's claims were dismissed.



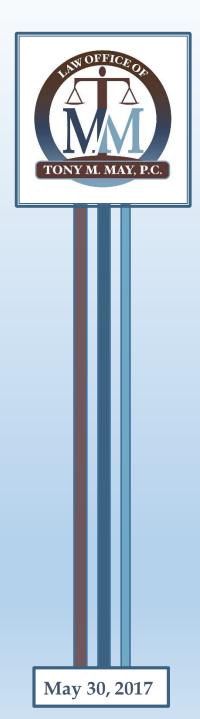
- 6. NRS 408.387 (Publication of Notice of Final Acceptance):
 - Before making final payment to GC on NDOT project, NDOT must publish a Notice of the Date of Final Acceptance for two weeks in every issue of a newspaper of general circulation in County where major portion of project was performed.
 - No final settlement or payment can be made until 30-days after final acceptance.



NDOT BOND CLAIMS

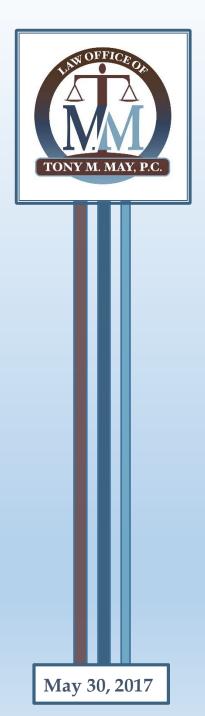
7. NRS 408.383 (Subcontractor Payment Requirements):

- NDOT is to pay GC at the end of each month of satisfactory work performed, but shall not pay more than 95% of the entire contract amount.
- ➤ Remaining 5%, but not more than \$50,000 retained.
- GC is required to pay its subcontractors and suppliers within 15-days of receipt of payment from NDOT.
- GC to make payment of both principle and interest it received from NDOT, in proportion to the work done by each subcontractor/supplier.
- Interest accrues at prime, plus 2%, from the 15th day after GC receives payment until paid.



COURSE OUTLINE

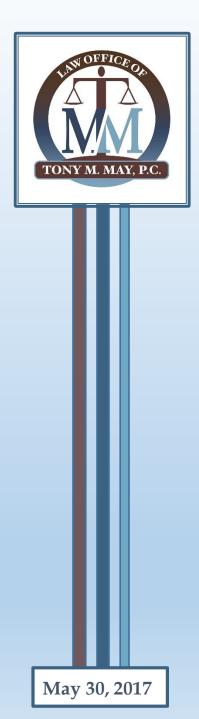
- 1. WHAT IS A BOND AND WHAT DOES IT DO?
- 2. NEVADA STATE CONTRACTORS BOARD BONDS.
- 3. BID BONDS.
- 4. **PERFORMANCE BONDS.**
- 5. PAYMENT BONDS.
- 6. PUBLIC WORKS BOND REQUIREMENTS.
- 7. NDOT BOND REQUIREMENTS.
- 8. FEDERAL MILLER ACT BOND REQUIREMENTS.



FEDERAL MILLER ACT CLAIMS

1. 40 U.S.C.A. § 3131

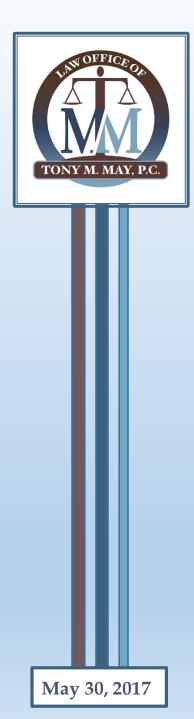
- Provisions here are different than those for Nevada's government bonds.
- Miller act requires GC's to obtain both a performance and payment bond for any project over \$100,000.
- All contractors on federal projects should make sure GC obtains Miller Act Bond, or risk loss of right to obtain remedy for non-payment.



FEDERAL MILLER ACT CLAIMS

1. Who does Federal Miller Act Protect

- \succ 1st tier subcontractors and suppliers
- 2nd tier subcontractor or supplier to 1st tier subcontractor: COVERED.
- 2nd tier subcontractor or supplier to 1st tier supplier: NOT COVERED.
- 3rd tier subcontractor or supplier to 2nd tier subcontractor: may be covered if 2nd tier went insolvent and 3rd tier dealt directly with 1st tier subcontractor.



FEDERAL MILLER ACT CLAIMS

1. Notice requirements/statute of limitations:

- 1st-teir subcontractors and suppliers: no notice required prior to filing lawsuit.
- 2nd-tier subcontractors and suppliers, contracting with 1st-tier supplier: no Federal Miller act rights.
- 2nd-tier subcontractors and suppliers, contracting with 1st-tier subcontractors: must give written notice of claim <u>within 90-days</u> of providing last labor or materials to the project.
- Oral notice is not enough.
- Must file suit within one (1) year of last providing labor and /or materials to the project.