

HOW TO GET PAID (BOND CLAIMS)



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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.





HOW TO GET PAID (BOND CLAIMS)

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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HOW TO GET PAID (BOND CLAIMS)

WHAT IS A BOND

1. Bond is not Insurance

- Lets look at a table to discuss the difference...





HOW TO GET PAID (BOND CLAIMS)

WHAT IS A BOND¹

Bonds

- Contract: ▪ Personal guarantee
- Protection: ▪ 3rd-Parties
- Premium: ▪ For guarantee
- Losses: ▪ Not expected
- Claims: ▪ Principle must repay

Insurance:

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



HOW TO GET PAID (BOND CLAIMS)

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.



HOW TO GET PAID (BOND CLAIMS)

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HOW TO GET PAID (BOND CLAIMS)

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 losing their license.
- According to NRS 624.270, the required license bonds ranges from \$1,000 to \$500,000, rarely over \$50,000.



HOW TO GET PAID (BOND CLAIMS)

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



HOW TO GET PAID (BOND CLAIMS)

NSCB LICENSE BONDS

3. Alternatives to the NSCB License Bond

- Contractor can choose 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.



HOW TO GET PAID (BOND CLAIMS)

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HOW TO GET PAID (BOND CLAIMS)

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.



HOW TO GET PAID (BOND CLAIMS)

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;



HOW TO GET PAID (BOND CLAIMS)

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.



HOW TO GET PAID (BOND CLAIMS)

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HOW TO GET PAID (BOND CLAIMS)

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.



HOW TO GET PAID (BOND CLAIMS)

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.



HOW TO GET PAID (BOND CLAIMS)

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.



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HOW TO GET PAID (BOND CLAIMS)

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.



HOW TO GET PAID (BOND CLAIMS)

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.



HOW TO GET PAID (BOND CLAIMS)

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.



HOW TO GET PAID (BOND CLAIMS)

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HOW TO GET PAID (BOND CLAIMS)

PUBLIC WORKS BONDS

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:
 - Capriotti, Lemon & Assoc. vs. Johnson Serv. Co., 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.



HOW TO GET PAID (BOND CLAIMS)

PUBLIC WORKS BONDS

1. NRS Chapter 339 (Cont.):

- Capriotti, Lemon & Assoc. vs. Johnson Serv. Co., 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.*



HOW TO GET PAID (BOND CLAIMS)

PUBLIC WORKS BONDS

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.



HOW TO GET PAID (BOND CLAIMS)

PUBLIC WORKS BONDS

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.



HOW TO GET PAID (BOND CLAIMS)

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.



HOW TO GET PAID (BOND CLAIMS)

PUBLIC WORKS 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.



HOW TO GET PAID (BOND CLAIMS)

PUBLIC WORKS BONDS

3. NRS 339.035 (*Actions on Payment Bonds*):

- 1st tier subcontractor/supplier requirements:
 - 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;



HOW TO GET PAID (BOND CLAIMS)

PUBLIC WORKS BONDS

3. NRS 339.035 (*Actions on Payment Bonds*):

➤ 2nd tier subcontractor requirements:

- *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 GC and Surety 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.



HOW TO GET PAID (BOND CLAIMS)

PUBLIC WORKS BONDS

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 30-days prior to initial notice being served on GC.



HOW TO GET PAID (BOND CLAIMS)

PUBLIC WORKS BONDS

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.



HOW TO GET PAID (BOND CLAIMS)

PUBLIC WORKS BONDS

3. NRS 339.035 (*Actions on Payment Bonds*):

➤ *Hartford Fire Ins. Co. v. Trs. of the Constr. Indus. & Laborers Health & Welfare Trust*, 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.



HOW TO GET PAID (BOND CLAIMS)

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; OR
 - Surety is in action where claim is being made against bond.



HOW TO GET PAID (BOND CLAIMS)

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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HOW TO GET PAID (BOND CLAIMS)

NDOT BOND CLAIMS

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.



HOW TO GET PAID (BOND CLAIMS)

NDOT BOND CLAIMS

2. NRS 408.337 (*Bid Security*):

- Bid Bond: 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.



HOW TO GET PAID (BOND CLAIMS)

NDOT BOND CLAIMS

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.



HOW TO GET PAID (BOND CLAIMS)

NDOT BOND CLAIMS

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.



HOW TO GET PAID (BOND CLAIMS)

NDOT BOND CLAIMS

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.



HOW TO GET PAID (BOND CLAIMS)

NDOT BOND CLAIMS

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 30-days of date of final acceptance of the project.



HOW TO GET PAID (BOND CLAIMS)

NDOT BOND CLAIMS

5. NRS 408.363 (*Claims against Contractor's Bond*):

➤ Payment Bond (Cont.):

- *Zalk-Josephs Co. v. Wells Cargo*, 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.



HOW TO GET PAID (BOND CLAIMS)

NDOT BOND CLAIMS

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.



HOW TO GET PAID (BOND CLAIMS)

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.



HOW TO GET PAID (BOND CLAIMS)

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HOW TO GET PAID (BOND CLAIMS)

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.



HOW TO GET PAID (BOND CLAIMS)

FEDERAL MILLER ACT CLAIMS

1. Who does Federal Miller Act Protect

- 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.



HOW TO GET PAID (BOND CLAIMS)

FEDERAL MILLER ACT CLAIMS

1. Notice requirements/statute of limitations:

- 1st-tier 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 within 90-days 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.