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Prompt Pay Acts Set Payment Guidelines for Construction Work

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Claims Under Miller Act Payment Bonds

The Miller Act, passed by Congress in 1935, protects subcontractors and certain materialmen on federal projects by requiring the general contractor to provide a payment bond on all construction contracts with the United States Government. By doing so, the Miller Act affords subcontractors and materialmen the same protections they would have on a private project under state lien laws.(1)

The Miller Act applies only to federal government projects. Bonding requirements for state government projects are governed by state law. While these state laws are commonly called “Little Miller Acts,” their protections and requirements can differ significantly from the federal law. Any unpaid subcontractor or materialman on a state contracting project must look to that state's law for its rights and protections.

Scope of the Miller Act

The Miller Act requires a general contractor to provide a payment bond for any contract “for the construction, alteration, or repair of any public building or public work of the Federal Government” in excess of \$100,000.00.(2) A few limited exceptions to the rule exist.(3)

Construction contracts between \$30,000.00 and \$100,000.00 are governed by Federal Acquisition Regulations that provide alternatives to payment bonds.(4) Those regulations permit the general contractor's payment obligations to be secured by a payment bond, an irrevocable letter of credit, an escrow agreement, a certificate of deposit, or a deposit of United States bonds or cash.(5) For these smaller contracts, the federal contracting officer is directed to offer two or more of these options to the general contractor, from which the general contractor must select and provide a proper security.(6)

Who May Assert a Claim?

The standard Miller Act Payment Bond form prepared by the U.S. General Services Administration(7) provides that the bond is for the protection of “all persons having a direct relationship with the [general contractor] or a subcontractor of the [general contractor] for furnishing labor, material or both in the prosecution of the work provided for in the contract...”(8) Thus, only those who contract directly with the general contractor or one of its subcontractors may recover under a Miller Act payment bond.(9) Those who provide labor or materials to a sub-subcontractor, or further remote subcontractor, are not protected, and may not assert a claim.(10)

By way of example, consider the following: General Contractor contracts with Concrete Company to perform concrete work. Concrete Company then contracts with Cement Mixer to supply concrete for the project, and also contracts with Framing Company to construct the concrete forms. Framing Company in turn contracts with Lumber Supplier to provide lumber for the forms. Cement Mixer and Framing Company are protected by General Contractor's payment bond, and may assert a claim under it. However, Lumber Supplier is too remote to assert a claim. For a materialman to recover under a Miller Act payment bond, it is not necessary that the materials supplied were in fact incorporated into the work. A materialman may recover under such a payment bond if it in good faith believed that the materials were intended to be used on the project.(11)

What is Recoverable?

The Miller Act provides protection for those furnishing “labor or material in carrying out work provided for in a contract for which a payment bond” is required.(12) The payment bond clearly protects those who perform labor directly on the jobsite, or supply materials directly incorporated into the project.

Materials. Materials actually incorporated into the work are within the scope of a Miller Act payment bond. Materials not actually incorporated into the work, but “indispensable to the prosecution of the work,” such as gasoline and oil for equipment, are also within the scope of the bond.(13)

Rental Equipment. The fair rental value of equipment used on a project, and necessary expenses in delivering the equipment to the job site, are within the scope of a Miller Act payment bond.(14) Even if the equipment was not actually used on the project, the supplier may recover, if it had a good faith reason to believe the equipment was to be used in the project.(15) However, the purchase of “capital equipment,” that is, equipment that is not “substantially consumed” in the prosecution of the work, is not recoverable.(16)

Project Supervision. Project supervision is recoverable if it requires—or could require— physical labor at the jobsite, but mere administrative or clerical tasks (payment of invoices, review of proposals, personnel hiring) do not come within the scope of the Miller Act.(17) However, inspection of work performed has been found to be within the Act's scope.(18)

Other Items. Overhead expenses, such as insurance premiums, are generally not recoverable.(19) However, contributions to health and welfare funds required under a collective bargaining agreement are recoverable.(20)

Delay Damages. Although courts have split on the issue, a subcontractor is generally entitled to recover damages for delays from a Miller Act surety, if the delays were caused by the general contractor. (21)

Interest and Attorneys' Fees. The Miller Act does not address whether interest or attorneys' fees are recoverable. Courts considering these issues usually look to state law in deciding whether interest or attorneys' fees are recoverable.(22) Generally speaking, interest and attorneys' fees will be recoverable if the claimant's contract allows for such recovery.(23) Courts have awarded interest and attorney's fees even if the contractual provision does not bind the general contractor that provided the bond.(24)

How to Assert a Claim

A subcontractor or materialman wishing to assert a claim against a Miller Act payment bond should first obtain a copy of the bond. The relevant federal department secretary or head of the contracting agency is obligated to provide a copy of this bond upon the claimant submitting an affidavit that he has supplied labor or material for the project and has not been paid.(25) The bond will contain the necessary information to contact the surety and assert a claim.

Notice. Persons who subcontract with or provide materials directly to the general contractor have no obligation under the Miller Act to give notice of their claim before filing suit.(26) Those persons who have no contract with the general contractor, but contracted with a subcontractor or supplier of the general contractor, must give notice of their claim to the general contractor in order to preserve their right to sue for recovery.(27) Written notice must be given to the general contractor within 90 days of the last day on which the person performed labor or supplied materials for which the claim is made.(28) The notice must state “with substantial accuracy” the amount claimed, as well as the name of the party to whom the material was furnished or for whom the labor was performed.(29) The notice must be served on the contractor by any means that provides a written, third-party verification of delivery to the contractor (e.g. certified or registered mail, FedEx).(30) The notice may

be delivered to “any place the contractor maintains an office or conducts business, or at the contractor’s residence.”(31) Alternatively, the notice may be served in any manner that the United States Marshall of the district in which the job is performed may serve a summons.(32) Because those means will vary from state to state, a claimant should consult with qualified counsel before attempting service in this manner.

Although service on the payment bond surety is not required under the Miller Act, a copy of the notice should be delivered to the surety, in order to put it on notice of the claim. Many claims can be resolved without the time and expense of litigation.

Suit. If the claim cannot be resolved, a claimant may bring suit to enforce its payment bond claim against the surety. A claimant cannot bring suit under a Miller Act payment bond until he has been unpaid for a period of 90 days from the last date he performed labor or supplied materials.(33) Once that 90-day period has expired, the claimant may bring suit, but must do so within one year of the last day on which labor was performed or material was supplied.(34) If the claimant does not bring suit within this one year period, his claim is barred.

Any suit to enforce a Miller Act payment bond claim must be brought in the United States District Court in which the project is located.(35) State courts do not have jurisdiction to adjudicate Miller Act payment bond claims.(36) A claimant is free to pursue common law claims in state court, but a Miller Act surety cannot be named as a party in the suit, cannot intervene in the suit, and is not bound by any state court judgment.(37)

Waiver of Claim. A subcontractor or materialman cannot waive its Miller Act payment bond rights in advance, or as a condition of being awarded a subcontract. Any waiver of the right to bring suit is void, unless the waiver is (i) in writing; (ii) signed by the person whose right is waived; and (iii) executed after the person furnished labor or material for use in the performance of the contract.(38)

(1) *United States ex rel. Otis Elevator Co. v. Piracci Constr. Co.*, 405 F. Supp. 908 (D.D.C. 1975); *J.J. Henry Co. v. U.S.*, 411 F.2d 46 (Ct. Cl. 1969).

(2) 40 U.S.C. §3131(b)(2). The Miller Act also requires the contractor to provide a performance bond, 40 U.S.C. §3131(b)(1), which is not the subject of this discussion.

(3) Bond requirements may be waived for certain military and merchant marine construction contracts, 40 U.S.C. §3134, and for projects on foreign soil if the contracting officer finds it impracticable for the contractor to furnish a bond. 40 U.S.C. §3131(d).

(4) 40 U.S.C. §3132(a).

(5) F.A.R 28.102-1(b)(1).

(6) *Id.*

(7) GSA Standard Form 25A (rev. 10-98).

(8) *Id.*

(9) *Unadilla Silo Co. v. Hess Bros., Inc.*, 586 A.2d 226 (N.J. 1991).

(10) *Id.*

(11) *United States ex rel. Carlson v. Continental Cas., Co.*, 414 F.2d 441 (5th Cir. 1969); *Ibex Indus. v. Coast Line Waterproofing*, 563 F. Supp. 1142 (D. Colo. 1983).

(12) 40 U.S.C. §3133(b)(1).

(13) *Glassell-Taylor Co. v. Magnolia Petroleum Co.*, 153 F.2d 527 (5th Cir. 1946).

(14) *United States ex rel. E. & R. Constr. Co. v. Guy H. James Constr. Co.*, 390 F. Supp. 1190 (M.D. Tenn. 1972).

(15) *United States ex rel. Robert DeFilippis Crane Serv. v. William L. Crow Constr.*, 826 F. Supp. 627 (E.D.N.Y. 1993).

(16) *Massachusetts Bonding & Ins. Co. v. U.S.*, 88 F.2d 88 (5th Cir. 1937).

(17) *United States ex rel. Constructors, Inc. v. Gulf Ins. Co.*, 313 F. Supp. 2d 593 (E.D. Va. 2004).

(18) *United States ex rel. Naberhaus-Burke v. Butt & Head, Inc.*, 535 F. Supp. 1155 (S.D. Ohio 1982)

- (19) *United States ex rel. Cobb-Strecker-Dunphy & Zimmerman v. M.A. Mortenson Co.*, 894 F.2d 311 (8th Cir. 1990).
- (20) *United States ex rel. Sherman v. Carter*, 353 U.S. 210 (1957).
- (21) *United States ex rel. Pertun Constr. Co. v. Harvesters Group, Inc.*, 918 F.2d 915 (11th Cir. 1990); cf. *United States ex rel. Pittsburgh-DeMoine Steel Co. v. MacDonald Constr. Co.*, 281 F. Supp. 1010 (E.D. Mo. 1968).
- (22) *United States ex rel. Delta Metals v. R.M. Wells Co.*, 497 F. Supp. 541 (S.D. Ga. 1980); *United States ex rel. Sanford v. Continental Cas. Co.*, 293 F. Supp. 816 (N.D. Miss. 1968).
- (23) *United States ex rel. Southeastern Supply Co. v. National Union Fire Ins. Co.*, 876 F.2d 92 (11th Cir. 1989); *United States ex rel. Carter Equip. Co. v. H.R. Morgan, Inc.*, 554 F.2d 164 (5th Cir. 1977).
- (24) *Id.*
- (25) 40 U.S.C. §3133(a).
- (26) 40 U.S.C. §3133(b).
- (27) 40 U.S.C. §3133(b)(2).
- (28) *Id.*
- (29) *Id.*
- (30) *Id.*
- (31) *Id.*
- (32) 40 U.S.C. §3133(b)(2)(B).
- (33) 40 U.S.C. §3133(b)(1).
- (34) 40 U.S.C. §3133(b)(4).
- (35) 40 U.S.C. §3133(b)(3)(B). Any suit brought to enforce a Miller Act payment bond lien must be brought in the name of the United States, for the use and benefit of the claimant. 40 U.S.C. §3133(b)(3)(A)
- (36) *Power Sys., Inc. v. Stallings & McCorvey, Inc.*, 454 So. 2d 736 (Fla. Ct. App. 1984).
- (37) *Id.*
- (38) 40 U.S.C. §3133(c).